No. 15-191
Vide 14-1418, 14-1453, 14-1505, 15-105, 15-119, 15-35
Title: Geneva College, Petitioner
v.
Sylvia Burwell, Secretary of Health and Human Services, et al.
Docketed: August 12, 2015
Linked with 15A1
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (13-3536, 14-1374)
Decision Date: February 11, 2015
Rehearing Denied: April 13, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Jun 29 2015	Application (15A1) to extend the time to file a petition for a writ of certiorari from July 12, 2015 to August 12, 2015, submitted to Justice Alito.
Jun 30 2015	Application (15A1) granted by Justice Alito extending the time to file until August 11, 2015.
Aug 11 2015	Petition for a writ of certiorari filed. (Response due September 11, 2015)
Aug 18 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner Geneva College.
Aug 20 2015	Brief of respondent Sylvia Burwell, Secretary of Health and Human Services, et al. in opposition filed. VIDED.
Aug 25 2015	Letter and attached Opinion of the United States Court of Appeals for the Sixth Circuit received from counsel for the respondents. VIDED.
Sep 4 2015	Reply of petitioner Geneva College filed.
Sep 4 2015	Letter and attached Opinion of the United States Court of Appeals for the Tenth Circuit received from counsel for the petitioners.
Sep 11 2015	Brief amicus curiae of Council for Christian Colleges & Universities filed.
Oct 1 2015	Letter dated September 30, 2015, received from counsel for the respondent. VIDED.
Oct 14 2015	DISTRIBUTED for Conference of October 30, 2015.
Nov 2 2015	DISTRIBUTED for Conference of November 6, 2015.
Nov 6 2015	Petition GRANTED The petition for a writ of certiorari in No. 14-1418 is granted limited to Question 1 presented by the petition. The motion of Association of American Physicians & Surgeons, et al. for leave to file a brief as amici curiae and the petition for a writ of certiorari in No. 14-1453 are granted. The petitions for writs of certiorari in Nos. 14-1505, 15-35 and 15-119 are granted. The petition for a writ of certiorari in No. 15-105 is granted limited to Questions 1 and 2 presented by the petition. The cases are consolidated.
Nov 6 2015	Letter from The Clerk to counsel for the parties requesting a joint briefing proposal by

	1 p.m., Monday, November 16,2015. VIDED
Nov 17 2015	The briefing proposal set forth in the parties' letter of November 16,2015, is adopted. Petitioners in Nos. 14-1418, 14-1453, and 14-1505 will file one consolidated opening brief and one reply brief. Petitioners in Nos. 15-35, 15-105, 15-119, and 15-191 willfile one consolidated opening brief and one reply brief. Petitioner's opening briefs, not to exceed 20,000 words each, are to be filed on or before January 4, 2016.Respondents will file one consolidated brief, not to exceed 22,500 words, on or before February 10, 2016. Petitioner's reply briefs, not to exceed 8,000 words each, are to be filed on or before March 11,2016. VIDED
Dec 7 2015	Joint motion for divided argument and enlargement of time for oral argument filed by petitioners. VIDED.
Dec 14 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondents. VIDED
Dec 15 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received, on behalf of all petitioners, in these consolidated cases. VIDED
Jan 4 2016	Joint appendix filed.(3 Volumes) (Statement of costs filed) VIDED
Jan 4 2016	Brief of Petitioners in Nos.14-1418,14-1453, & 14-1505 filed. VIDED.
Jan 4 2016	Brief of Petitioners in Nos.15-35,15-105,15-119, & 15-191filed. VIDED.
Jan 5 2016	Brief amici curiae of Orthodox Jewish Rabbis filed. VIDED.
Jan 8 2016	Brief amici curiae of United States of Catholic Bishops, et al.filed. VIDED.
Jan 8 2016	Brief amici curiae of CNS International Ministries, Inc. and Heartland Christian College filed. VIDED.
Jan 8 2016	Brief amicus curiae of the Breast Cancer Prevention Institute filed. VIDED.
Jan 10 2016	Brief amici curiae of Residents and Families of Residents at Homes of the Little Sisters of the Poor filed.VIDED.
Jan 11 2016	Brief amicus curiae of The School of the Ozarks, Inc. d/b/a College of the Ozarks filed.VIDED.
Jan 11 2016	Brief amici curiae of Texas, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Southern Baptist Theological Seminary, et al.filed.VIDED.
Jan 11 2016	Brief amici curiae of Christian Legal Society, et al.filed.VIDED.
Jan 11 2016	Brief amici curiae of Church of the LukumiBabalu Aye,Inc., et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Christian and Missionary Foundation, Inc., et al.filed.VIDED.
Jan 11 2016	Brief amici curiae of 207 Members of Congress filed.VIDED.
Jan 11 2016	Brief amici curiae of National Jewish Commission on Law and Public Affairs (COLPA) filed. VIDED.
Jan 11 2016	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund,Inc. filed. VIDED.
Jan 11 2016	Brief amici curiae of Former Justice Department Officials filed.VIDED.
Jan 11 2016	Brief amicus curiae of Ethics and Public Policy Center filed.VIDED.
Jan 11 2016	Brief amici curiae of The Cato Institute and Independent Women's Forum filed. VIDED.
Jan 11 2016	Brief amici curiae of National Association of Evangelicals, et al. filed.VIDED.
Jan 11 2016	Brief amici curiae of 50 Catholic Theologians and Ethicists filed. VIDED.
Jan 11 2016	Brief amici curiae of Association of American Physicians & Surgeons, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Constitutional Law Scholars filed. VIDED.
Jan 11 2016	Brief amicus curiae of Women Speak for Themselves filed. VIDED.
Jan 11 2016	Brief amicus curiae of Liberty Counsel filed. VIDED.
Jan 11 2016	Brief amicus curiae of Council for Christian Colleges and Universities filed. VIDED.
Jan 11 2016	Brief amicus curiae of the Knights of Columbus filed.VIDED.
Jan 11 2016	Brief amici curiae of Bart Stupak, et al. filed. VIDED.

Jan 11 2016	Brief amici curiae of Dominican Sisters of Mary, Mother of the Eucharist, et al. filed. VIDED.
Jan 11 2016	Brief amicus curiae of Thomas More Law Center filed. VIDED.
Jan 11 2016	Brief amici curiae of ACNA Jurisdiction of the Armed forces and Chaplancy, et al. filed. VIDED.
Jan 11 2016	Brief amicus curiae of Eternal Word Television Network filed. VIDED.
Jan 11 2016	Brief amicus curiae of David Boyle filed. VIDED.
Jan 11 2016	Brief amicus curiae of Justice and Freedom Fund filed. VIDED.
Jan 11 2016	Brief amici curiae of Thirteen Law Professors filed. VIDED.
Jan 11 2016	Brief amicus curiae of International Conference of Evangelical Chaplain Endorsers filed. VIDED.
Jan 11 2016	Brief amicus curiae of Concerned Women for America filed. VIDED.
Jan 11 2016	Brief amicus curiae of Michael J. New, Ph.D., Associate Scholar at the Charlotte Lozier Institute filed. VIDED.
Jan 11 2016	Brief amicus curiae of American Center for Law and Justice filed. VIDED.
Jan 11 2016	Brief amici curiae of U.S. Justice Foundation, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Carmelite Sisters of the Most Sacred Heart of Los Angeles, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of The Catholic Benefits Association, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Religious Institutions filed. VIDED.
Jan 15 2016	Joint motion for divided argument and enlargement of time for oral argument GRANTED. VIDED
Jan 29 2016	SET FOR ARGUMENT ON Wednesday, March 23, 2016. VIDED
Feb 8 2016	Record requested from U.S.C.A. 3rd Circuit.
Feb 10 2016	CIRCULATED.
Feb 10 2016	Brief of respondents Sylvia Burwell, Secretary of Health and Human Services, et al. filed. VIDED. (Distributed)
Feb 10 2016	Brief amicus curiae of American Humanist Association filed. VIDED. (Distributed)
Feb 12 2016	Brief amici curiae of Harvard Law School Center for Health Law and Policy Innovation, et al. filed. VIDED. (Distributed)
Feb 16 2016	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED. (Distributed)
Feb 16 2016	Brief amici curiae of Church-state Scholars filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Baptist Joint Committee for Religious Liberty filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Compassion & Choices filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of National Women's Law Center and 68 Other Organizations filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Norman Dorsen, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Ovarian Cancer Research Fund Alliance, et al. (2 Volumes) filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of American Jewish Committee, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of National Latina Institute for Reproductive Health, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Catholics for Choice, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Former State Attorneys General, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Foreign and International Law Experts Lawrence O. Gostin, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of 240 Students, Faculty, and staff at Religiously Affiliated Universities filed.

	VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of American Academy of Pediatrics filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Scholars of Religious Liberty Sarah Barringer Gordon, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Health Policy Experts filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Anti-Defamation League, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Black Women's Health Imperative filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Guttmacher Institute, and Professor Sara Rosenbaum filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Lambda Legal Defense and Education Fund, Inc., et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of 123 Members of the United States Congress filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Military Historians filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The National Health Law Program, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of California, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Honorable Robert C. "Bobby" Scott filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Center for Inquiry, and American Atheists filed. (Distributed) VIDED
Feb 19 2016	Record received from U.S.C.A. 3rd Circuit is electronic.
Mar 4 2016	Letter from counsel for the respondents with copy of C.A. 11th Circuit opinion attached. (Distributed) VIDED.
Mar 11 2016	Reply of Petitioners in 15-35, 15-105, 15-119, & 15-191 filed. VIDED. (Distributed)
Mar 11 2016	Reply of Petitioners in Nos 14-1418, 14-1453 & 14-1505 filed. VIDED. (Distributed)
Mar 23 2016	Argued. For petitioners in Nos. 15-35, 15-105, 15-119 & 15-191: Paul D. Clement, Washington, D.C. For petitioners in Nos. 14-1418, 14-1453, & 14-1505: Noel Francisco, Washington, D.C. For respondents: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D.C. VIDED.
Mar 29 2016	The parties are directed to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioner's employees through petitioner's insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees. Petitioners with insured plans are currently required to submit a form either to their insurer or to the Federal Government (naming petitioner's insurance company), stating that petitioners object on religious grounds to providing contraceptive coverage. The parties are directed to address whether contraceptive coverage could be provided to petitioner's employees, through petitioner's insurance companies, without any such notice from petitioners. For example, the parties should consider a situation in which petitioners would contract to provide health insurance for their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds.
Mar 29 2016	Petitioners would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the Federal Government, or to their employees. At the same time, petitioner's insurance company aware that petitioners are not providing certain contraceptive coverage on religious grounds would separately notify petitioner's employees that the insurance company will provide cost-free contraceptive coverage, and that such coverage is not paid for by petitioners and is not provided through petitioner's health plan. The parties may address other proposals along similar lines,

	avoiding repetition of discussion in prior briefing. The briefs, limited to a single brief 25 pages in length for petitioners, and a single brief 20 pages in length for respondents, are to be filed simultaneously with the Clerk and served upon counsel for the other parties on or before April12, 2016. Reply briefs, limited to a single brief 10 pages in length for petitioners and for respondents, are to be filed simultaneously with the Clerk and served upon opposing counsel for the other parties on or before April 20,2016. VIDED
Apr 12 2016	Supplemental brief of petitioners filed. VIDED.(Distributed)
Apr 12 2016	Supplemental brief of respondents filed. VIDED. (Distributed)
Apr 20 2016	Supplemental reply brief of petitioners filed. VIDED.(Distributed)
Apr 20 2016	Supplemental reply brief of respondents filed. VIDED.(Distributed)
May 16 2016	Judgment VACATED and case REMANDED. Opinion per curiam. Sotomayor, J., filed a concurring opinion, in which Ginsburg, J., joined. VIDED.
Jun 17 2016	JUDGMENT ISSUED

15-191

Supreme Court, U.S.
FILED
AUG 11 2015
OFFICE OF THE CLERK

NO. _____

In the Supreme Court of the United States

GENEVA COLLEGE,

Petitioner,

v.

SYLVIA MATHEWS BURWELL, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The government recently declared that under federal regulations implementing the Patient Protection and Affordable Care Act of 2010 ("ACA"), it is giving "seamless coverage" of contraception to participants in the health plans of objecting religious organizations. 80 Fed. Reg. 41,318, 41,328 (July 14, 2015). Petitioner Geneva College objects as a matter of religious belief to providing a health plan that is seamless with coverage of abortifacients that may prevent the implantation of an embryo.

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014), this Court held that compelling certain for-profit religious employers to provide health insurance coverage for objectionable FDA-approved contraceptives, *see* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (the "Mandate"), violated the Religious Freedom Restoration Act ("RFRA"). Geneva College similarly sought relief from the Mandate under RFRA. Yet the decision below held that the Mandate "totally removes" Geneva College from the process, despite its use of "seamless coverage," and therefore it does not burden religious exercise under RFRA, substantially or otherwise.

The question presented is:

Whether, under *Hobby Lobby*, the Mandate's imposition of seamless abortifacient coverage on objecting religious nonprofit organizations' health plans substantially burdens religious exercise and violates RFRA.

PARTIES TO THE PROCEEDING

Petitioner, which was the Plaintiff below, is Geneva College.

Respondents, who were Defendants below, are Sylvia Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a nonprofit religious corporation. The Petitioner has no parent corporation. No publicly held corporation owns any portion of any of Petitioner.

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E. District Court Order 2 (12/23/13) 122a

F. Third Circuit Denial of Petition for Rehearing (4/13/15) 125a

G. Third Circuit Mandate (2/11/15) 128a

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- 26 U.S.C. § 4980H 141a
- 42 U.S.C. § 2000bb-1 ..... 148a
- 42 U.S.C. § 2000bb-2 ..... 149a
- 42 U.S.C. § 2000cc-5 ..... 150a
- 42 U.S.C. § 300gg-13(a) 153a

I. Excerpts from Pertinent Regulatory Provisions
- 26 C.F.R. § 54.9815-2713AT 155a
- 29 C.F.R. § 2590.715-2713A 161a
- 45 C.F.R. § 147.131 ..... 168a
- 80 Fed. Reg. 41,318 ..... 174a

J. Self-Certification Form 180a

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29 C.F.R. § 2590.715-2713A (2014) 6, 10, 14, 35

45 C.F.R. § 147.131 (2014).....6, 10-11, 25

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78 Fed. Reg. 39,870 (July 2, 2013).....10, 25-26

79 Fed. Reg. 51,092 (Aug. 27, 2014) 13

80 Fed. Reg. 41,318 (Aug. 27, 2014) .....*passim*

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Other Authorities:

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Manya Brachear Pashman, "Wheaton College ends coverage amid fight against birth control mandate," *Chicago Tribune* (July 29, 2015), *available at* http://www.chicagotribune.com/news/local/breaking/ct-wheaton-college-ends-student-insurance-met-20150728-story.html 3, 29

Department of Labor, Coverage of Preventive Services, *available at* http://www.dol.gov/ebsa/health

reform/regulations/coverageofpreventive services.html 12

HHS, ASPE Data Point, *The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans* 3 (May 14, 2015), *available at* http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf. 11

Matthew Archibold, "Franciscan University of Steubenville to Drop Student Health Insurance," *Catholic Educ. Daily* (May 15, 2012), *available at* http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/744/franciscan-university-of-steubenville-to-drop-student-health-insurance.aspx 29

INTRODUCTION

Petitioner Geneva College objects as a matter of religious belief to facilitating access to abortifacients that it believes can destroy embryonic human life. Regulations promulgated under the ACA compel employers with more than fifty full-time employees to provide health-insurance coverage, and compel most kinds of group insurance plans to cover FDA-approved contraceptives (the "Mandate"), including abortifacients that may prevent the implantation of an embryo after the fertilization of the sperm and ovum.

The government exempted churches and closely related groups entirely from the Mandate. For religious nonprofits, however, the government crafted an alternative means of complying with the Mandate—the so-called "accommodation." The government admits that the accommodation gives "seamless coverage" of contraception in connection with the health plans of objecting religious nonprofits. 80 Fed. Reg. at 41,328.

Despite the admittedly "seamless" character of this coverage, the government and the decision below argue that the accommodation "totally removes" religious nonprofits from the provision of abortifacient contraceptives. Pet. App. 43a. But Geneva cannot be both totally removed from providing abortifacients while the same items are provided in "seamless coverage" with Geneva's own health plans. The government's description of "seamlessness" shows that the accommodation does not cut the religious objector out of the process.

Instead, the accommodation involves Geneva filing an objection and then, on an ongoing basis, being tied "seamless[ly]" to the provision of abortifacient items in connection with its continual provision of health insurance. 80 Fed. Reg. at 41,328.

Evidence that the form or notice that the accommodation requires Geneva to submit actually modifies its health plan is found in the form itself, which states that either one is "an instrument under which the plan is operated." Pet. App. 82a. The objection form filed under the accommodation does not "exempt" Geneva from the Mandate. Exemptions are treated separately in the regulations, and they apply only to church-related groups. The accommodation is a way for Geneva to comply with the Mandate, not a means of obtaining an exemption.

Upon executing an objection form or notice, Geneva's involvement in abortifacient coverage begins, rather than ends. The precise items that Geneva objects to causing coverage for, will, by operation of the accommodation, be covered for Geneva's own health plan participants with the health plan that Geneva provides. The government forces Geneva to provide that plan for its employees. The abortifacients will be covered precisely because those persons are enrolled in Geneva's plan, and only "when" Geneva executes the objection notification, 80 Fed. Reg. at 41,344, and such notification amends the plan.

The accommodation alters Geneva's health plan to allow for provision of abortifacients. The objection

process requires Geneva to notify or identify for the government who its insurer is, so it can be forced to provide abortifacients with Geneva's plan. The process also requires Geneva to identify and contract with an insurer that will provide the abortifacients in this same fashion.

The accommodation legally and practically serves to bring abortifacients to Geneva's plan participants without any seam between the objectionable coverage and Geneva's activity of providing a health plan. This leads Geneva and other religious nonprofits to be complicit in providing abortifacient coverage. If it were indeed true that the government is acting completely "outside" of Geneva's health plan, why is it that Geneva must participate at all? There is no need to file any "objection notice" as the insurance company is already aware of Geneva's objection to these items. The government can easily work directly with the insurance company to provide whatever it wishes—without "seamlessly" using Geneva's insurance plans. The ACA itself makes clear that the government is implementing the Mandate in Geneva's "group health plan," not separate from that plan. 42 U.S.C. § 300gg-13. Geneva's moral concern is therefore not conjured up. In fact, being coerced under the Mandate's accommodation has already led some religious colleges to drop health coverage for students who have need of it.[1]

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[1] *See, e.g.*, Manya Brachear Pashman, "Wheaton College ends coverage amid fight against birth control mandate," *Chicago Tribune* (July 29, 2015), *available at* http://www.chicagotribune.com/news/local/breaking/ct-wheaton-college-ends-

Below, the court of appeals failed to appreciate Geneva College's intertwinement with the coverage of abortifacients to which it objects. Consequently the court failed to faithfully apply this Court's substantial-burden analysis in *Hobby Lobby*, and denied Geneva College's RFRA claim along with those of a number of other religious nonprofit groups.

This case presents the "specific [religious] objection" to the government's accommodation scheme, "considered in detail by the courts" below, that *Hobby Lobby* lacked. *Id.* at 2786 (Kennedy, J, concurring). Both the enforceability of the ACA and the scope of RFRA are at stake. Religious nonprofits urgently need this Court's guidance, and this case is a clean vehicle for clarifying free exercise law. Further review by this Court is warranted.

DECISIONS BELOW

The panel opinion of the court of appeals is reported at 778 F.3d 422 (3d Cir. 2015), and reprinted in Pet. App. at 1a-49a. The district court issued two opinions. The first related to Geneva's student health plan, reported at 960 F. Supp. 2d 588 (W.D. Pa. 2013), and reprinted in Pet. App. at 50a–79a. The second concerned its employee health plan, reported at 988 F. Supp. 2d 511 (W.D. Pa. 2013), and reprinted in Pet. App. at 83a–121a.

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student-insurance-met-20150728-story.html (last visited August 3, 2015).

JURISDICTION

The Third Circuit's judgment was entered on February 11, 2015. Pet. App. 128a–132a. Petitioners obtained an extension of time in which to file a petition for a writ of certiorari. Letter Order Granting Extension of Time, June 29, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The Religious Freedom Restoration Act of 1993 provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb–1(a), unless "it demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb–1(b).

"[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title." 42 U.S.C. § 2000bb–2(4). "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7). "Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb–3(b).

The Patient Protection and Affordable Care Act of 2010 states, in relevant part, that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . .[,] (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg–13(a)&(a)(4).

The following pertinent provisions are reproduced in the Petition Appendix ("Pet. App.") at 133a–179a: 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13(a); 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. § 54.9815-2713AT; 29 C.F.R. § 2590.715-2713A; 45 C.F.R. § 147.131; 80 Fed. Reg. 41,318, 41,328, 41,344 (July 14, 2015).

STATEMENT OF THE CASE

I. Factual Background

Petitioner Geneva College ("Geneva") is a religious institution of higher learning. Geneva's mission is "to glorify God by educating and ministering to a diverse community of students in order to develop servant-leaders who will transform society for the kingdom of Christ" and in pursuing that mission, offers student programs and activities rooted in its Christian beliefs. Pet. App. 54a. These activities have included extensive pro-life work by its students and faculty. Pet. App. 55a. Geneva's

employees must profess the Christian faith and agree with the college's beliefs, and its students need to abide by Christian standards of morality. Pet. App. 54a. Geneva holds to the Reformed Presbyterian Church of North America (RPCNA) Testimony, valuing human life from the moment of conception. Amended Complaint at 9.

As a matter of religious conviction, Geneva believes that it is sinful and immoral for it to participate in, facilitate, enable, or otherwise support access to abortion-inducing drugs and devices. Pet. App. 54-55a. Geneva holds that the Ten Commandments' rule "thou shalt not murder" prevents Christians from facilitating or enabling the use of drugs or devices that are capable of preventing the uterine implantation of an embryo after the fertilization of sperm and ovum. Am. Compl. at 2. The government does not contest the sincerity of Geneva's religious beliefs. Pet. App. 67a.

Here, Geneva's religious objection to the Mandate is limited to facilitating or enabling access to Plan B (the "morning after pill"), ella (the "week after pill"), certain IUDs, and related counseling—the same items objected to in *Hobby Lobby*. Pet. App. 51a; 134 S. Ct. at 2765–66. Geneva does not object to covering the other sixteen FDA-approved methods of birth control. *See Hobby Lobby*, 134 S. Ct. at 2766. Geneva objects on religious grounds to including in, or enabling in connection with, its health plans drugs or devices that may stop the implantation of embryos and thus have an abortifacient effect. Pet. App. 56a, Am. Compl. at 14; *see also Hobby Lobby*, 134 S. Ct. at 2762

(recognizing that four FDA-approved contraceptives may inhibit an embryo's "attachment to the uterus"). This objection extends to compliance with the unadorned Mandate or its accommodation. Am. Compl. 39-40.

Geneva believes that it has a religious duty to care for its members' physical well-being by providing generous health insurance benefits. Pet. App. 95a. Geneva has an insurance plan for its employees. *Id.* It also has a student insurance plan. *Id.* Consistent with Geneva's religious beliefs, all of its current healthcare plans exclude the four methods of FDA-approved contraceptives that may have an abortifacient effect. *Id.*

The Mandate prohibits Geneva from continuing to provide health plans that comport with its religious beliefs. Instead, it is faced with four untenable options: (1) include abortifacient coverage in its health plans in compliance with the Mandate and violate its religious faith, (2) violate the Mandate and incur penalties of $100 per day for each affected individual, (3) discontinue all health plan coverage, violate its religious beliefs, pay $2,000 per year per employee (after the first thirty), and abandon health coverage for students who need it, or (4) self-certify its religious objection to the Mandate, which then includes "seamless coverage" of abortifacients under the auspices of Geneva's own health plans in violation of its beliefs. *See generally* Pet. App. 93a-96a.

The spiritual cost of violating Geneva's religious beliefs and participating in the provision of drugs

and items it reasonably believes to have an abortifacient effect is incalculable. But the ruinous financial penalties Geneva would incur by violating the Mandate are not. Annually, refusing to comply with the Mandate would subject Geneva to fines totaling as much as $10.2 million per year. Am. Compl. at 9; *cf.* 26 U.S.C. § 4980D (employing 280 full-time staff members with the approximately $100/day fine). Dropping health insurance altogether would not only violate Geneva's religious beliefs, drive up costs, seriously compromise Geneva's competitiveness in the marketplace, and harm the employees, students and family members who value those plans, but it would also result in collective annual fines totaling almost $500,000. Am. Compl. at 33; *Hobby Lobby*, 134 S. Ct. at 2776–77.

II. Regulatory Background

In 2010, Congress passed the ACA. PUB. L. NO. 111–148, 124 Stat. 119 (2010). The ACA mandates that many health insurance plans cover preventive care and screenings without requiring recipients to share the costs. 42 U.S.C. § 300gg–13(a)(4). Though Congress did not require contraceptive coverage in the ACA's text, the Department of Health and Human Services incorporated guidelines formulated by the private Institute of Medicine (IOM) into its preventive-care regulations. *See Hobby* Lobby, 134 S. Ct. at 2762. The IOM guidelines mandate that Geneva include all FDA-approved contraceptives, sterilization procedures, and related counseling in its healthcare plans. *See id.*

The government's Mandate scheme makes enrollment in group health plans a prerequisite to the provision of objectionable abortifacients. Individuals have no right to contraceptive coverage under the Mandate absent health plan enrollment. *See* 29 C.F.R. § 2590.715-2713A(d) (explaining that contraceptives are available only "so long as [beneficiaries] are enrolled in [a] group health plan").

Employers that violate the Mandate face lawsuits under ERISA and fines of up to $100 per plan participant per day. 29 U.S.C. § 1132; 26 U.S.C. § 4980D; *Hobby Lobby*, 134 S. Ct. at 2762. These fines would quickly destroy Geneva's religious ministry and the hundreds of jobs that go with it, even though all members of Geneva's community adhere to its beliefs and opposition to the four forms of contraception in question. Pet. App. 93a, 96a.

The government completely exempts thousands of religious orders and churches and their integrated auxiliaries from the Mandate for exactly this reason, but it refuses to extend this "religious employer" exemption to Geneva and other religious nonprofits. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); (opining, without citing a source, that churches "are more likely than other employers to employ people of the same faith who share the same objection"). Religious entities that meet the government's narrow definition of a "religious employer" are not required to take any action to obtain an exemption from the Mandate, nor do plan participants receive any objected-to contraceptive coverage in connection with those employers' plans (or otherwise) under the

Mandate. 45 C.F.R. § 147.131(a). These exempted groups exist wholly outside of the Mandate's bounds.

The government exempts thousands of non-religious employers from the Mandate as well. Employers that hire fewer than fifty employees are not required to provide health insurance at all, and thus can avoid compliance with the Mandate that way. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). This is true despite the fact that such small businesses employ approximately 34 million people. *Hobby Lobby*, 134 S. Ct. at 2764.

Employers with certain grandfathered healthcare plans that have only changed minimally since 2010 are also exempt from the Mandate. 42 U.S.C. § 18011; *see also Hobby Lobby*, 134 S. Ct. at 2763-64. Roughly 46 million people are enrolled in these healthcare plans. HHS, ASPE Data Point, *The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans* 3 (May 14, 2015), *available at* http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf (last visited July 31, 2015). And "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10.

Rather than exempting religious nonprofits from the Mandate as it did thousands of other religious and nonreligious organizations, the government created an alternative method for them to comply with the Mandate. This so-called "accommodation" is a way to comply, not a way to be exempt. *See* 45 C.F.R. § 147.131(c)(1) (noting that "an eligible organization . . . complies with any requirement . . .

to provide contraceptive coverage if [it] furnishes a copy of the self-certification" to its insurance issuer); 80 Fed. Reg. at 41,344 (July 14, 2015) (explaining that the plan of "an eligible organization" that fulfills the alternative method of compliance "complies for one or more plan years with any requirement under" the Mandate); 77 Fed. Reg. 8,725, 8,727 (Feb. 15, 2012) (announcing plans for formulating an accommodation covering "nonexempted" nonprofit religious groups). The religious group's compliance occurs in a Mandate that imposes coverage in "[a] group health plan," not separate from it. 42 U.S.C. § 300gg-13.

If a religious organization with an insured or self-insured group health plan (1) has religious objections to providing some or all contraceptives required by the Mandate, (2) is organized and operates as a nonprofit entity, (3) holds itself out as a religious organization, and (4) self-certifies that it meets the first three criteria, it may instigate this alternative means of compliance. *Id.* at 39,874-80. The first, but not last, stage of the process is the self-certification requirement. It can be accomplished in two ways but both methods have the same result. *See* Dep't of Labor, Coverage of Preventive Services, *available at* http://www.dol.gov/ebsa/healthreform/regulations/coverageofpreventiveservices.html (last visited July 31, 2015) (listing both the "EBSA form 700" and a "Model Notice to Secretary of HHS" as means of self-certification).

Under the first self-certification method, a religious nonprofit may complete the Employee Benefits Security Administration's Form 700 ("EBSA

Form 700" or the "Form") and provide the Form to its health insurance issuer for insured plans, or to the third party plan administrator for self-insured plans. *Id.* Under the second method, a religious nonprofit may mail or email the U.S. Department of Health and Human Services ("HHS") a notice declaring that it objects to providing some or all contraceptive services required by the Mandate (the "Notice"). 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014). This notice must also contain (a) the name of the organization and the basis on which it qualifies for an accommodation, (b) a description of its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptives, (c) the name and type of group health plan it possesses, and (d) the name and contact information for its health insurance issuers or third party plan administrators. *Id.* at 51,094–95.

Either of the self-certification methods modifies the religious organization's health plan itself. "Th[e] form [700] or a notice to the Secretary is an instrument under which the plan is operated." Pet. App. 182a. Submitting either the form or the notice instigates a process in which the same abortifacient items to which the religious organization objects are provided in "seamless coverage" with the health plan that the religious organization continues to sponsor. *See* 80 Fed. Reg. at 41,328; *see also Priests For Life v. U.S. Dep't. of Health and Human Servs.*, 772 F.3d 229, 236 (D.C. Cir. 2014) ("The regulations assure, however, that the legally mandated coverage is in place to seamlessly provide contraceptive services to women who want them"). This continuing health plan is one that the government is requiring the

religious organization to provide, if it has over 50 full time employees. Everyone who receives this abortifacient coverage receives it by means of enrollment in the religious group's own health plan. In its regulations, the government specifically rejected proposals to provide this coverage in a manner separate and removed from the objecting religious group. Instead the government insisted it must, through the accommodation, provide the items in "seamless coverage" with the religious group's own continuing health plan arrangements. *Id.*

The coverage flows to the religious organization's employees because the organization submitted one of the two self-certifications. If the religious group uses the EBSA Form 700, the insurance issuers possess "responsibility" for the coverage "[w]hen a copy of the self certification is provided directly to an issuer." 80 Fed. Reg. at 41,344. When the religious group uses the method of notifying HHS directly and including all the relevant details of its health plan, HHS "will send a separate notification to each of the plan's health insurance issuers . . . describing the obligations of the issuer under this section" to provide coverage of the objected-to contraception in relation to the religious group's own health plan. *Id.*; *see also* 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2590.715-2713A.

The practical ramifications of executing and submitting the Form or Notice are significant in regard to insured plans. Under this Court's holding in *Hobby Lobby*, the government may not apply the Mandate to force closely-held for-profit religious employers or nonprofit religious employers to cover

religiously-objectionable contraceptives in their health plans. *See* 134 S. Ct. at 2785 ("[U]nder the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful"). But the self-certification form does not exempt religious groups, since the government denies them the exemption given to churches. The accommodation is an instrument of compliance, through which abortifacients are provided under the auspices of the objecting organization's own health plan.

In short, the accommodation is simply a way to impose what *Hobby Lobby* prohibits the government from imposing: abortifacient coverage with the objecting religious organization's ongoing and mandated provision of health insurance to its employees. The government has no authority to impose this coverage except through the Mandate enjoined by *Hobby Lobby*.

III. Proceedings Below

Geneva College filed suit in the U.S. District Court for the Western District of Pennsylvania, challenging the application of the Mandate under RFRA and seeking preliminary injunctive relief. Geneva moved for a preliminary injunction twice: once before the government was set to impose the Mandate on its student health plan in the summer of 2013, and once before the Mandate would have applied to its employee health plan at the beginning of 2014. Pet. App. 51a, 84a-85a.

The district court granted both of Geneva's requests for a preliminary injunction. It enjoined

and restrained Respondents "from applying or enforcing the requirements imposed in 42 U.S.C. § 300gg-13(a)(4) by requiring that Geneva's student [and later, its "employee"] health insurance plan, its plan broker, or its plan insurer provide abortifacients contrary to Geneva's religious objections." Pet. App. 81a, 123a. Considering the accommodation specifically, it held that "submission of the self-certification form is not too attenuated from the provision of the objected to services. Instead, it is the necessary stimulus behind their provision." Pet. App. 115a.

Accordingly, the district court held "that the Mandate, including the accommodation, imposed a substantial burden under the RFRA." Pet. App. 116a. Anticipating this Court's rationale in *Hobby Lobby*, it declared that "[c]ourts should not undertake to dissect religious beliefs and second-guess where an objector draws the line when analyzing substantial burden questions." Pet. App. 115a (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1141 (10th Cir. 2013)). Relying on "the Supreme Court's decisions in *Yoder*, *Sherbert* and *Thomas*," the district court concluded that "[t]he Mandate forces Geneva to facilitate access to the objected to services through the self-certification process. [T]his is a not a line that the government can compel Geneva to cross." Pet. App. 116a. It concluded that the accommodation forces Geneva "to choose between violating its deeply held religious beliefs and terminating its employee health insurance coverage entirely in order to avoid the ACA's regulatory scheme." Pet. App. 116a. This option imposes "a severe, direct financial hardship,"

as well as "indirect hardship in that a burden would be placed on its efforts to recruit and retain employees if it fails to offer health insurance." Pet. App. 116a (citing *Jimmy Swaggart Ministries v. Bd. of Equalization of Calif.*, 493 U.S. 378, 392 (1990)).

The district court squarely rejected the notion that under the accommodation, Geneva "need not do anything more than it did prior to the promulgation of the challenged regulations—this is, to inform its issuer that it objects to providing contraceptive coverage." Pet. App. 114-115a n.37 (quoting *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 7 F. Supp. 2d. 88, 100 (D.D.C. Dec. 19, 2013)). On the contrary, it observed that "[p]rior to the ACA, the result of that notification was that employees could not obtain insurance coverage for the objected to services" in connection with Geneva's plan. Pet. App. 115a n.37. But under the Mandate, "the result of that notification is that employees must be provided insurance coverage for those same services" in connection to Geneva's plan. *Id.*

Thus "Geneva has two choices: (1) provide insurance coverage to its employees, which will result in coverage for the objected to services; or (2) refuse to provide insurance coverage for its employees, which will result in fines, harm to its employees' well-being, and competitive disadvantages." *Id.* Since "[b]oth options require Geneva to act contrary to its religious duties and beliefs," the requirement constitutes a substantial burden. *Id.* The district court agreed with the analogy used by a fellow judge of that court, "that a person might be willing to provide a neighbor with a

knife to cut meat, but not to commit murder." Pet. App. 114a (citing *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 605–06 (W.D. Pa. 2013)). "The purpose for which the notification is provided, and the compulsion to file it, makes all the difference." *Id.*

Respondents appealed both injunctions. The court of appeals subsequently consolidated Geneva College's two cases with one another, and with two other challenges to the Mandate filed by nonprofit religious groups.[2] A panel of the court of appeals reversed the district court's grants of preliminary injunctions to Geneva College. Pet. App. 1a–49a. The panel held that not only does the Mandate's accommodation process impose no "substantial" burden under RFRA, it imposes no burden whatsoever. Pet. App. 44a.

Rather than asking whether the Mandate imposed substantial pressure on Geneva to violate its religious beliefs, which the government conceded are sincere, the panel decided it could inquire "whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage." Pet. App. 30a. By reference to language in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the panel claimed that under RFRA it could judge whether "the burden on the respondents' belief was '*heavy enough*'" Pet. App. 31a (emphasis in original) (quoting *Lyng*, 485 U.S. 439,

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[2] The court of appeals consolidated Geneva's cases with cases brought by the Catholic dioceses of Pittsburgh and Erie and organizations associated with each. None of these organizations are parties to this petition for writ of certiorari.

447 (1988)). The panel proceeded to rely extensively on the view of the substantial burden doctrine set forth by Judge Rovner in her dissent in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2103), a decision for which this Court denied the government's petition for certiorari in the wake of *Hobby Lobby*. *See Burwell v. Korte*, No. 13-397 (U.S. July 1, 2014).

The panel reframed this Court's substantial burden holding in *Hobby Lobby* as one in which this Court decided not whether the government has imposed substantial pressure to violate one's religious beliefs, but instead on whether the government's requirements "render[ed] the plaintiffs 'complicit.'" Pet. App. 33a. The panel then proceeded to declare that "we cannot agree" with Geneva's assertion that the actions it must undertake under the accommodation "make[] them complicit" in evil. Pet. App. 39a. The panel based this judgment on a dichotomy it asserted between, on the one hand, the self-certification form Geneva must submit, and on the other hand, "federal law" requirements that the insurance issuer provide contraception coverage. Pet. App. 44a. In this respect, the panel overlooked the convergence between the self-certification and federal law, since under the accommodation regulations, the contraception coverage does not flow to Geneva's employees or students unless and until the notification form is submitted. 80 Fed. Reg. at 41,344 (insurer responsibilities and obligations occur only "when" the religious group submits the self-certification). Three times the panel observed that the contraception coverage only flows "once" Geneva submits its form, Pet. App. 11a, 36a n.13, 38a, but it

denied the regulatory fact that this coverage flows *only if* Geneva submits its form.

The panel attempted to assert a second dichotomy, between whether a burden is imposed by "merely the filing of the form," or instead by "what follows from it." Pet. App. 39a. The panel concluded "free exercise jurisprudence instructs that we are to examine the act the appellees must perform—not the effect of that act" such as "an independent obligation on a third party," which is how it characterized the contraceptive coverage subsequent to the College's self-certification. Pet. App. 37a. In this respect, the panel did not address the core of Geneva's argument that it becomes complicit because "what follows from" the self-certification is not "independent" from Geneva or from the form. The subsequent contraception coverage is "seamless" with Geneva's own plan, which the ACA requires Geneva to provide. And the coverage only flows to certain persons because they are enrolled in Geneva's plan, and only "when" Geneva submits the form, but not otherwise.

Geneva argued that its complicity rests not in the self-certification form in the abstract, but on the fact that the resulting contraception access occurs in seamless coverage with Geneva's own health plan, a plan the ACA requires it to provide. *See generally* Brief of Appellees at 11-18, Geneva College v. Burwell, No. 13-3536 (3d Cir. July 28, 2015). The panel responded to this argument by claiming that "the obligation to provide contraceptive coverage arises only because it sponsors an employee or student health plan." Pet. App. 36a n. 13. Rather

than showing how the accommodation's objectionable contraceptive coverage would occur in the absence of Geneva's students or employees being enrolled in Geneva's own plans, the panel simply reiterated its view that "federal law" requires the coverage, and therefore assumed that as a consequence Geneva is not involved. *Id.* The panel therefore did not directly deal with Geneva's point that it is the "federal law" that requires the "seamless coverage" of abortifacients *by means of* Geneva's own health plan and its self-certification that is being challenged.

In this respect, the panel also asserted, using language from *Bowen v. Roy*, that religious exercise rights do not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development." Pet. App. 40a (quoting *Bowen*, 476 U.S. 693, (1986)). But the panel did not address the government's operation in continuity with and as a consequence of Geneva's ongoing health plan activities, instead concluding that the accommodation "totally removes" and "totally disconnect[s]" Geneva from the subsequent coverage. Pet. App. 43a, 45a.

Ultimately the panel did not squarely address what this Court called the correct substantial burden question: "whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, 134 S. Ct. at 2778. Instead it rested on the essentially theological assertion that "submission of the self-certification form does not make the appellees

'complicit,'" contrary to Geneva's religious belief that the accommodation process does make the College morally complicit. Pet. App. 37a. In this respect the panel engaged in a variation of "a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)"—that is, whether Geneva's view of its own complicity is reasonable or not. *Hobby Lobby*, 134 S. Ct. at 2778. As a result the panel concluded that no burden exists on Geneva's religious exercise at all, much less a "substantial" one. Pet. App. 44a.

REASONS FOR GRANTING THE WRIT

This Court demonstrated significant regard for the crisis of conscience religious nonprofits face in light of the Mandate and its accommodation in *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 1022 (2014), *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and *Zubik v. Burwell*, 135 S. Ct. 2924 (2015). The Mandate's accommodation involves religious organizations in an ongoing relationship with abortifacient coverage to which they profoundly object. This is due to religious groups' continuing (and mandatory) provision of health insurance coverage to which the government is attaching items that can destroy human life.

The courts of appeals, including the Third Circuit below, have failed to show the same respect for conscience that this Court has displayed. Instead, they have disregarded the Court's teachings in *Hobby Lobby* concerning RFRA's substantial-burden

analysis and substituted their own moral judgments in place of the beliefs of sincere religious objectors regarding the Mandate's significance. This Court's intervention is needed to restore balance and ensure that RFRA provides the "very broad protection for religious liberty" that Congress intended. *Hobby Lobby*, 134 S. Ct. at 2760.

I. Whether the Mandate's Application to Religious Nonprofits Violates RFRA is a Question of Exceptional Importance.

Geneva College and other religious nonprofits like it claim the right to provide health insurance to their employees and students without including or facilitating the provision of contraceptives to which they religiously object. This concern is similar to the question this Court granted review to decide in *Hobby Lobby*, which asked whether the government could "demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners." 134 S. Ct. at 2759. This Court held "that the HHS mandate is unlawful" as applied to those for-profit entities. *Id.* Whether RFRA grants religious nonprofits the same right is an "important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c); *see Hobby Lobby*, 134 S. Ct. at 2782 (reserving the question of whether the government's alternative compliance mechanism for nonprofits "complies with RFRA for purposes of all religious claims").

The government itself acknowledges that the Mandate's accommodation accomplishes coverage of abortifacients in close connection with religious organizations' own continuing health plan. 80 Fed. Reg. at 41,328; *see also Priests for Life*, 772 F.3d at 236 ("The regulations assure ... that the legally mandated coverage is in place to seamlessly provide contraceptive services to women who want them"). This implicates Geneva in a continual and tightly connected relationship between its ongoing provision of health insurance and the coverage of abortifacients.

The objectionable coverage does not flow separately, independently, or "totally remove[d]" from Geneva as the decision below claims. Pet. App. 43a. Instead, the government admits that it flows in "seamless coverage" with Geneva's own health plan. Geneva's compliance occurs in a Mandate that imposes coverage in "a group health plan," not separate from it. 42 U.S.C. § 300gg-13. Moreover, that health plan is one the ACA forces Geneva to provide its employees (and with respect to Geneva's employees and students, coverage Geneva is religiously motivated to provide). The people who receive the coverage that the accommodation requires are, by definition, only people enrolled in a plan that Geneva itself is sponsoring—if they are not enrolled in Geneva's own ongoing health coverage, they do not receive it. And the coverage occurs *because of* Geneva's submission of its self-certification, flowing only "when" Geneva submits the form or notice. 80 Fed. Reg. at 41,344. That self-certification becomes "an instrument under which the plan is operated." Pet. App. 82a, and modifies

Geneva's health plan to allow for the provision of abortifacients.

The government could have relieved religious nonprofits from this moral crisis by exempting them, but it has refused to do so. The government found the Mandate *and* its accommodation to have such a significant moral impact that it chose to entirely exempt a subset of religious employers that consists of religious orders, churches, and their integrated auxiliaries. 78 Fed. Reg. at 39,874; 26 C.F.R. § 1.6033-2(h). Those groups need not submit a self-certification form, nor does any abortifacient coverage flow to their employees in conjunction with their health plan, seamlessly or otherwise.

But the government made this exemption so narrow that it does not include many deeply religious organizations, such as Geneva College. The accommodation itself is not an exemption—it is instead a means of compliance. *See, e.g.*, 45 C.F.R. § 147.131(c)(1) (noting that "an eligible organization . . . complies with any requirement . . . to provide contraceptive coverage if [it] furnishes a copy of the self-certification" to its insurance issuer).

The government's rationale for defining its actual exemption so narrowly, and imposing the accommodation's compliance regime on religious organizations like Geneva, is that churches and related organizations "that object[] to contraceptive coverage on religious grounds are more likely than other [religious] employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to

use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

This unsubstantiated assertion fails to account for religious educational institutions, like Geneva, whose community members subscribe to the same beliefs and thus share the same religious objections. As a result, some religious nonprofit employers (*e.g.*, integrated auxiliaries of churches, some of which are educational institutions) are completely exempt from the Mandate, whereas other similarly-situated religious nonprofit employers are not (*e.g.*, religious universities). *See Hobby Lobby*, 134 S. Ct. at 2777 n.33 (recognizing that "churches[] that have the very same religious objections" as Geneva are exempt from the Mandate); *id.* at 2786 (Kennedy, J., concurring) ("RFRA is inconsistent with . . . an agency such as HHS . . . distinguishing between different religious believers . . . when it may treat both equally"); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (prohibiting "favoritism among sects"); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (recognizing the dangers of "preferring some religious groups over" others).

Many religious employers accordingly faced a crisis of conscience after the Mandate took effect and their health plans were set to renew. The Mandate precludes religious employers like Geneva from keeping their existing health plans, which comply with their religious beliefs and do not include or facilitate the provision of objectionable contraceptives. What remains are four untenable options: (1) comply with the Mandate directly by offering health plans that include abortifacients,

(2) comply with the Mandate through the accommodation's alternative compliance mechanism, which includes abortifacients in or under the auspices of religious nonprofits' health plans, (3) refuse to comply with the Mandate and offer health plans that exclude abortifacients and incur $100-per-employer-per-day fines, or (4) drop health coverage altogether and incur annual fines of $2,000 per employee (after the first thirty).

The first and second options equally violate Geneva's religious beliefs. *See* Pet. App. 167a; *cf. Hobby Lobby*, 134 S. Ct. at 2759 ("If the owners comply with the HHS mandate, they believe they will be facilitating abortions"). As the district court recognized, "the consequence of the Final Rules' self-certification notification is that [Geneva's] employees must be provided access to the objected to services" in connection with Geneva's own health plan. Pet. App. 114a.

If Geneva exercised the third option discussed above—violating the Mandate—it would incur crushing financial penalties. Religious employers that are subject to the Mandate incur $100 per-employee-per-day fines for refusing to provide abortifacient contraceptives. This penalty would result in Geneva incurring annual collective fines of as much as $10.2 million, a ruinous amount for a non-profit college. Am. Compl. at 9; 26 U.S.C. § 4980D; *cf. Hobby Lobby*, 134 S. Ct. at 2775–76 (recognizing that fines for violating the Mandate ranging from $15 to $475 million per year "are surely substantial").

The fourth option, that of dropping coverage, is religiously objectionable, financially implausible with respect to Geneva's employees, and harmful to the persons enrolled in Geneva's health plans. It would deny Geneva the ability to fulfill its religious obligation to live out its beliefs concerning the value of human life by providing health insurance to its community members. Pet. App. 158a; *cf. Hobby Lobby*, 134 S. Ct. at 2776 ("[T]he Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees."). Moreover, it would subject Geneva to fines totaling almost $10.2 million, a ruinous amount for a non-profit college. Am. Compl. at 9; 26 U.S.C. § 4980D; and put them at "a competitive disadvantage" in the marketplace by forcing employees to obtain their own health insurance, which is generally more expensive than participating in a group health plan, *Hobby Lobby*, 134 S. Ct. at 2777. It would also lead to an increase in employees' salaries designed to defray the costs of individual health plans, but any such payment would have to account for employees' increased exposure to personal income tax. *Id.* And dropping health coverage would harm members of the Geneva community who like their plan and the doctors and benefits provided therein.

In other respects, including through the grandfathering provision that exempts plans from many requirements including the Mandate, the ACA and the Respondents have acted to "protect Americans' ability to keep their current plan if they

like it."[3] But with respect to student plans, the accommodation and court rulings upholding it have already led some religious institutions of higher education to drop student health coverage rather than provide a plan by which coverage of objectionable contraceptives will be imposed.[4] Colleges provide student plans to protect the health of students, and without those plans students' well-being may suffer.

Whether RFRA allows the government to force religious nonprofits, like Geneva, to choose one of these untenable options is a question of exceptional importance. Our nation was founded on freedom of religion and Congress mandated that RFRA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the [statute's terms] and the Constitution." *Hobby Lobby*, 134 S. Ct. at 2762 (quoting 42 U.S.C. § 2000cc-3(g)). This Court should decide whether religious nonprofits' claim to freedom to offer health

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[3] Centers for Medicare and Medicaid Servs., "Amendment to Regulation on 'Grandfathered' Health Plans under the Affordable Care Act," *available at* https://www.cms.gov/CCIIO/Resources/Files/factsheet_grandfather_amendment.html (last visited August 3, 2015) (discussing "the 'grandfather' regulation").

[4] *See supra* note 1 (discussing Wheaton College's July 2015 decision to drop student coverage); *see also* Matthew Archibold, "Franciscan University of Steubenville to Drop Student Health Insurance," *Catholic Educ. Daily* (May 15, 2012), *available at* http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/744/franciscan-university-of-steubenville-to-drop-student-health-insurance.aspx (last visited August 3, 2015).

insurance in accordance with their faith fits within these expansive bounds.

The question is particularly important in the context of the ACA, one of the most sweeping and intrusive federal laws ever enacted. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2649 (2012) (joint dissent) (noting the threat the individual mandate posed to "our constitutional order" by subjecting "*all* private conduct (including failure to act) . . . to federal control"). As this Court recognized in *Hobby Lobby*, the Mandate raises important concerns over the power of the ACA to trump even the most fundamental of rights. It would be incongruous for this Court to consider the religious freedom of for-profit corporations like Hobby Lobby and Conestoga Wood but leave religious nonprofit organizations like Geneva without recourse.

More than a hundred religious nonprofits have filed over fifty cases seeking relief from the religious coercion that flows from the Mandate. Religious nonprofits urgently need the Court to settle this Term whether RFRA exempts them from the Mandate or whether they are legally prohibited from "striving for a self-definition shaped by their religious precepts." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

II. The Court of Appeals' Substantial-Burden Analysis Conflicts with *Hobby Lobby*.

This Court's review is also warranted because the court of appeals conducted its substantial-burden

analysis under RFRA in a manner "that [squarely] conflicts with" *Hobby Lobby*. SUP. CT. R. 10(c). In that case, this Court considered "whether the challenged HHS regulations substantially burden[ed] the exercise of religion" and held "that they do." *Hobby Lobby*, 134 S. Ct. at 2759. Religious objectors in *Hobby Lobby* sincerely believed that "[i]f [they] compl[ied] with the HHS mandate, . . . they [would] be facilitating abortions, and if they [did] not comply, they [would] pay a very heavy price" in the form of ruinous fines. *Id.* This Court reasoned that "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." *Id.*

No daylight exists between *Hobby Lobby* and the present case.[5] Geneva, like the religious objectors in *Hobby Lobby*, believes that by complying with the Mandate (either directly or through the accommodation's alternative mechanism for compliance), it would be facilitating abortions. Pet. App. 107a; *cf. Hobby Lobby*, 134 S. Ct. at 2775 ("[T]he HHS mandate demands that [religious objectors] engage in conduct that seriously violates their religious beliefs."). The sincerity of those religious beliefs is uncontested. Pet. App. 67a; *cf.*

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[5] Notably, this Court has twice granted review, vacated judgments against religious nonprofits challenging the Mandate, and remanded these cases to lower courts for reconsideration in light of *Hobby Lobby* because there was a "reasonable probability" that those decisions rest on "a premise" that should now be "reject[ed]." *Lawrence ex rel. Lawrence v. Charter*, 516 U.S. 163, 167 (1996); *see Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Mich. Catholic Conf. v. Burwell*, 135 S. Ct. 1914 (2015).

Hobby Lobby, 134 S. Ct. at 2779 (noting "HHS [did] not question [the religious objectors'] sincerity"). If Geneva refuses to comply with the Mandate, it will incur the same proportion of annual fines, estimated in amounts of $10.2 million, a ruinous amount for a non-profit college. See Am. Compl. at 9; 26 U.S.C. § 4980D; *cf. Hobby Lobby*, 134 S. Ct. at 2775–76 (noting the religious objectors faced $15 to $475 million in annual fines).

As in *Hobby Lobby*, by requiring organizations such as Geneva to comply with the Mandate, "HHS . . . demands that they engage in conduct that seriously violates their religious beliefs." *Id.* at 2775. This Court's holding that RFRA's substantial-burden standard is readily satisfied under these circumstances thus applies in full force. *Id.* at 2759. The court of appeals evaded this straightforward conclusion by accepting arguments that are indistinguishable from those *Hobby Lobby* rejected.

The government in *Hobby Lobby* sought to preclude relief under RFRA by arguing that "the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an ovum) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." *Id.* at 2777. But this Court recognized that such an "argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal

courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at 2778.

The court of appeals below adopted this attenuation argument under the guise of determining "whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage." Pet. App. 30a. It found a lack of complicity based on its view that Geneva was "totally remove[d]" from the accommodation process. But in that process objectionable abortifacients are provided in concert with Geneva's own, continuing, paid, and government-mandated plan, and only "when" Geneva submits a self-certification form. Pet. App. 43a. Geneva cannot be both "totally removed" from providing abortifacient contraception, and have those same items provided seamlessly with its own, ongoing health plan. The court below thus asked, and answered incorrectly, what this Court called the wrong question that "courts have no business addressing." *See Hobby Lobby*, 134 S. Ct. at 2778.

The court below pinned the consequences of the Mandate on "federal law." Pet. App. 34a–35a. But the panel gave insufficient regard to *how* that law intimately involves Geneva in the provision of abortifacient contraceptives, *i.e.*, by means of a close connection with Geneva's health plan. This refusal to acknowledge the inescapable connection between Geneva, its self-certification, and the coverage of contraceptives to which it religiously objects, is simply a short cut for the government's

"attenuation" argument in *Hobby Lobby*. 134 S. Ct. at 2777. But this Court made clear that RFRA's substantial-burden standard does not turn on a court's assessment of the directness of the causal connection between the objector's required conduct and the "immoral act[s]" that its religion forbids it from enabling. *See id.* at 2778; *see also id.* at 2779 ("[T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

Geneva, like the religious objectors in *Hobby Lobby*, believes that complying with the Mandate "is connected to the destruction of an embryo in a way that is sufficient to make it immoral for [Geneva] to provide [health] coverage." *Id.* at 2778. But the court below swam headlong into an essentially theological judgment by declaring that "submission of the self-certification form does not make the appellees 'complicit,'" contrary to Geneva's own moral analysis. Pet. App. 37a. Answering this "difficult and important question of religion and moral philosophy" with one "binding national answer" and telling Geneva "that their [religious] beliefs are flawed," as this Court explained in *Hobby Lobby*, is not a job for HHS or the courts. 134 S. Ct. at 2778. The only relevant question under RFRA is whether Geneva's asserted religious beliefs "reflect 'an honest conviction' and there is no dispute that it does." *Id.* at 2779 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). Under *Hobby Lobby*, "[b]ecause the contraceptive mandate forces

[Geneva] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.*

Though RFRA does not require that religious objectors draw a moral line that is "'[]reasonable,'" *id.* at 2778 (quoting *Thomas*, 450 U.S. at 715), Geneva's religious objections surely are. The government's Mandate and accommodation scheme make Geneva an ongoing actor in connection to the provision of religiously objectionable contraceptives. 80 Fed. Reg. at 41,328. That coverage occurs in tight connection to the plan Geneva is buying for its employees, based on a mandate from the government that it purchase such a plan, and only "when" Geneva submits its self-certification with its insurer's information on the form or notice. 80 Fed. Reg. at 41,344. No person gets this coverage the accommodation imposes in the Geneva community unless the person is enrolled in Geneva's own health plans. *See* 29 C.F.R. § 2590.715-2713A(d) (explaining that contraceptives are available only "so long as [beneficiaries] are enrolled in [a religious nonprofits'] group health plan").

The government is simply trying to skirt this Court's holding in *Hobby Lobby* that precludes the government from applying the unamended Mandate to Geneva. *See* 134 S. Ct. at 2785 ("[U]nder the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful."). But lacking statutory authority, the Defendants cannot impose abortifacient coverage except by forcing Geneva to be

involved. This intricate involvement implicates a "substantial burden" on Geneva, for which an "attenuation" argument fares no better than it did in *Hobby Lobby*.

Significantly, this Court has made clear that even an "indirect consequence" of a law can amount to a "substantial burden" on objectors' free exercise of religion. *Thomas*, 450 U.S. at 717. The penalties to which Geneva is subject for following its beliefs are of the same magnitude as those in *Hobby Lobby*.

The Third Circuit was thus wrong to hold that the Mandate does not substantially burden Geneva's free exercise of religion. As a number of esteemed court of appeals judges have recognized, *Hobby Lobby* compels the opposite conclusion. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 17-22 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from denial of rehearing en banc, joined by Henderson, J.); *id.* at 35 (Kavanaugh, J., dissenting from denial of rehearing en banc); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 (7th Cir. 2015) (Flaum, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J. specially concurring). This Court's review is needed to realign the courts of appeals with *Hobby Lobby* and restore the "very broad protection for religious liberty" that Congress intended in enacting RFRA.[6] 134 S. Ct. at 2767.

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[6] Recognizing that the Mandate substantially burdens Petitioner's free exercise of religion would plainly invalidate its application to Geneva under RFRA. "The least-restrictive-

III. This Case is a Clean Vehicle.

This case presents an ideal vehicle for resolving the question presented. The relevant facts have never been disputed by either side, and no judge below suggested any deficiencies in the record. All the elements of a RFRA claim were briefed and argued below. The court of appeals' decision below definitively resolved the RFRA claim against Geneva and left nothing to be determined on remand. Though the Third Circuit reversed the entry of preliminary injunctions, its legal ruling on the merits forecloses Geneva's pursuit of its RFRA claim as a matter of law.

In addition, Geneva College presents two kinds of plans that are essential to the Court's consideration of this matter: a fully insured employee plan purchased from an insurance company, and a student health plan. Most employers, though large enough to be required under the ACA to provide insurance, are not large enough to be able to afford a self-funded health plan. Resolving the Mandate's application to a nonprofit's fully-insured plan is therefore essential and a matter of national importance.

Fully-insured plans are involved no less in the moral implications of the accommodation than are

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means standard is exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2781. Perhaps "[t]he most straightforward way of [providing contraceptive coverage] would be for the [g]overnment to assume the cost of providing the four contraceptives at issue," *Hobby Lobby*, 134 S. Ct. at 2780, by using the government health care exchanges.

self-insured plans, so a resolution for the former could be inclusive of the latter. Moreover, Geneva College presents facts similar to many nonprofit religious organizations that are educational in nature and at the collegiate level provide student health insurance plans. As referenced above, several of those have been morally compelled to drop student health coverage because of the accommodation. *See supra* notes 1 & 4 and accompanying text. Granting review in this case would allow for a full consideration of the important questions raised by the Mandate and its accommodation.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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August 11, 2015

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-3536, 14-1374, 14-1376, 14-1377

GENEVA COLLEGE; WAYNE HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 13-3536

GENEVA COLLEGE; WAYNE L. HEPLER, in his personal capacity and as owner and operator of the sole proprietorship WLH Enterprises; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14–1374

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE, A CHARITABLE TRUST; THE ROMAN CATHOLIC DIOCESE OF ERIE; ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; ERIE CATHOLIC PREPARATORY SCHOOL, AN AFFILIATE NONPROFIT CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14–1376

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust; THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as the Beneficial Owner of the Pittsburgh series of The Catholic Benefits Trust; CATHOLIC CHARITIES OF THE DIOCESE OF PITTSBURGH, INC., an affiliate nonprofit corporation of The Roman Catholic Diocese of Pittsburgh

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES

DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14–1377.

On Appeal from the United States District Court for the Western District of Pennsylvania
(District Court Nos.: 1-13-cv-00303; 2-12-cv-00207 and 2-13-cv-01459)
District Judges: Honorable Joy Flowers Conti; Honorable Arthur J. Schwab

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Argued on November 19, 2014

Before: McKEE, Chief Judge, RENDELL, SLOVITER, Circuit Judges

(Opinion filed: February 11, 2015)

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OPINION

RENDELL, Circuit Judge:

The appellees in these consolidated appeals challenge the preventive services requirements of the Patient Protection and Affordable Care Act ("ACA"), Pub.L. No. 111–148, 124 Stat. 119 (2010), under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb–4.

Particularly, the appellees object to the ACA's requirement that contraceptive coverage be provided to their plan participants and beneficiaries. However, the nonprofit appellees are eligible for an accommodation to the contraceptive coverage requirement, whereby once they advise that they will not pay for the contraceptive services, coverage for those services will be independently provided by an insurance issuer or third-party administrator. The appellees urge that the accommodation violates RFRA because it forces them to "facilitate" or "trigger" the provision of insurance coverage for contraceptive services, which they oppose on religious grounds. The appellees affiliated with the Catholic Church also object on the basis that the application of the accommodation to Catholic nonprofit organizations has the impermissible effect of dividing the Catholic Church, because the Dioceses themselves are eligible for an actual exemption from the contraceptive coverage requirement. The District Courts granted the appellees' motions for a preliminary injunction, and, in one of the cases, converted the preliminary injunction to a permanent injunction. Because we disagree with the District Courts and conclude that the accommodation places no substantial burden on the appellees, we will reverse.

I. BACKGROUND

A. Statutory and Regulatory Background

1. The Affordable Care Act, the Preventive Services Coverage Requirement, and the

Accommodation for Religious Nonprofit Organizations

In 2010, Congress passed the ACA, which requires group health plans and health insurance issuers offering health insurance coverage[1] to cover preventive care and screenings for women, without cost sharing (such as a copayment, coinsurance, or a deductible), as provided for in guidelines established by the Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg–13(a)(4).[2] HHS requested assistance from the Institute of Medicine ("IOM"), a nonprofit arm of the National Academy of Sciences, to develop guidelines regarding which preventive services for women should be required. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77

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[1] Eligible organizations may be either "insured" or "self-insured." An employer has an "insured" plan if it contracts with an insurance company to bear the financial risk of paying its employees' health insurance claims. An employer has a "self-insured" plan if it bears the financial risk of paying its employees' claims. Many self-insured employers use third-party administrators to administer their plans and process claims. *See* Cong. Budget Office, Key Issues in Analyzing Major Health Insurance Proposals 6 (2008). The appellees here fall into both categories.

[2] The ACA's preventive care requirements apply only to non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage. *See* 45 C.F.R. § 147.140 (exempting "grandfathered" plans—"coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled as of March 23, 2010," the date on which the ACA was enacted "for as long as it maintains that status under the rules of this section").

Fed.Reg. 8725, 8726 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; and 45 C.F.R. pt. 147). The IOM issued a report recommending a list of preventive care services, including all contraceptive methods approved by the Food and Drug Administration ("FDA"). The regulatory guidelines accordingly included "[a]ll Food and Drug Administration ... approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. 77 Fed.Reg. at 8725 (alteration in original). The relevant regulations require coverage of the contraceptive services recommended in the guidelines. *See* 26 C.F.R. § 54.9815–2713(a)(1)(iv); 29 C.F.R. § 2590.715–2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv).

The implementing regulations authorize an exemption from contraceptive coverage for the group health plan of a "religious employer." 45 C.F.R. § 147.131(a). The regulations define a religious employer as a nonprofit organization described in the Internal Revenue Code provision referring to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. *Id.* (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

After notice-and-comment rulemaking, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (the "Departments") published final regulations in July 2013 that provided relief for organizations that, while not "religious employers,"

nonetheless oppose coverage on account of their religious objections. These regulations include an "accommodation" for group health plans established or maintained by "eligible organizations" (and group health coverage provided in connection with such plans). *See* 26 C.F.R. § 54.9815–2713A(a), 29 C.F.R. § 2590.715–2713A(a), 45 C.F.R. § 147.131(b); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed.Reg. 39,870 (July 2, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; and 45 C.F.R. pts. 147 & 156). An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered ... on account of religious objections." 45 C.F.R. § 147.131(b). To invoke this accommodation, an employer must certify that it is such an organization. *Id.* § 147.131(b)(4). Here, there is no dispute that the nonprofit religious organization appellees are eligible organizations under these regulations.

To take advantage of the accommodation to the contraceptive coverage requirement, the eligible organization must complete the self-certification form, EBSA Form 700, issued by the Department of Labor's Employee Benefits Security Administration, indicating that it has a religious objection to providing coverage for the required contraceptive services. The eligible organization then is to provide

a copy of the form to its insurance issuer or third-party administrator. 78 Fed.Reg. at 39,875.[3]

The submission of the form has no real effect on the plan participants and beneficiaries. They still have access to contraception, without cost sharing, through alternate mechanisms in the regulations.[4]

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[3] After these suits had been filed, the Supreme Court granted an injunction pending appeal in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and ordered that the eligible organization applicant need not use EBSA Form 700 to notify its insurance issuer or third-party administrator of its religious objection to the contraceptive coverage requirement; instead, if the organization notifies the government in writing of its objection, the government is enjoined from enforcing the contraceptive coverage requirement against the organization. *Id.* at 2807. In response, interim final regulations were issued in August 2014 allowing an eligible organization to opt out by notifying HHS directly, rather than notifying its insurance issuer or third-party administrator; the eligible organization also need not use EBSA Form 700. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; and 45 C.F.R. pt. 147); *see also* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii). We conclude here that the accommodation, even when utilizing EBSA Form 700, poses no substantial burden. To the extent that the Supreme Court's order in *Wheaton* may be read to signal that the alternative notification procedure is less burdensome than using EBSA Form 700, we also conclude that the alternative compliance mechanism set forth in the August 2014 regulations poses no substantial burden.

[4] The Supreme Court has recognized that the accommodation ensures that employees of entities with religious objections have the same access to all FDA-approved contraceptives as employees of entities without religious objections to providing such coverage. "The effect of the HHS-created accommodation on the women employed . . . would be precisely zero. Under that

Under these regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it objects on religious grounds. 78 Fed.Reg. at 39,874. As a result, either the health insurance issuer or the third-party administrator is required by regulation to provide separate payments for contraceptive services for plan participants and beneficiaries. The ACA's prohibition on cost sharing for preventive services, including contraception, bars the insurance issuer or third-party administrator from imposing any premium or fee on the group health plan, or plan participants and beneficiaries. Furthermore, the accommodation prohibits the insurance issuer or third-party administrator from imposing such fees on the eligible organization. *See* 42 U.S.C. § 300gg–13(a); 29 C.F.R. § 2590.715–2713A(b)(2), (c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii). The insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the [eligible organization's] group health plan" and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 29 C.F.R. § 2590.715–2713A(c)(2)(i)(A), (ii); 45 C.F.R. § 147.131(c)(2)(i)(A), (ii). The third-party administrator may seek reimbursement for payments for contraceptive services from the federal government. 29 C.F.R. § 2590.715–2713A(b)(3).

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accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

Furthermore, the health insurance issuer or third-party administrator, *not* the eligible organization, provides notice to the plan participants and beneficiaries regarding contraceptive coverage "separate from" materials that are distributed in connection with the eligible organization's group health coverage, specifying that "the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints." *See* 26 C.F.R. § 54.9815–2713A(d); 29 C.F.R. § 2590.715–2713A(d); 45 C.F.R. § 147.131(d).[5] This is in accordance with the preventive services requirement of the ACA.

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[5] As part of this separate notice regime, eligible organizations do not need to provide the names of their beneficiaries to their insurance issuers or third-party administrators, or otherwise coordinate notices with them. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 254 (D.C. Cir. 2014) (agreeing that "[n]o regulation related to the accommodation imposes any such duty on Plaintiffs"); *see also* 29 C.F.R. § 2590.715-2713A(b)(4) ("A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor"); *id.* § 2590.715-2713A(c)(1)(i) ("When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage . . . . An issuer may not require any further documentation from the eligible organization regarding its status as such.").

2. RFRA Challenge to the Accommodation

The appellees challenge the ACA's contraceptive coverage requirement as posing a substantial burden on their religious exercise, in violation of RFRA. RFRA places requirements on all federal statutes that impact a person's exercise of religion, even when that federal statute is a rule of general applicability. 42 U.S.C. § 2000bb–1(a).[6] Under RFRA, the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb–1(b).

Congress enacted RFRA in 1993 in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith*, the Supreme Court rejected the balancing test for evaluating claims under the Free Exercise Clause of the First Amendment set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), under which the Court asked whether the challenged law substantially burdened a religious practice and,

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[6] Because the issue was not raised before us, we assume that RFRA is constitutional as applied to federal laws and regulations. But see City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress did not have authority under the Fourteenth Amendment to impose RFRA on state or local laws).

if it did, whether that burden was justified by a compelling governmental interest. The *Smith* Court concluded that the continued application of the compelling-interest test would produce a constitutional right to ignore neutral laws of general applicability and would "open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind," which the First Amendment does not require. 494 U.S. at 888–89, 110 S.Ct. 1595. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' " *Id.* at 885, 110 S.Ct. 1595 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988)). Making an individual's obligation to obey a generally applicable law contingent upon the individual's religious beliefs, except where the state interest is compelling, permits that individual, "by virtue of his beliefs, 'to become a law unto himself,' " which "contradicts both constitutional tradition and common sense." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 167, 25 L.Ed. 244 (1878)).

Congress then passed RFRA to legislatively overrule the *Smith* standard for analyzing claims under the Free Exercise Clause of the First Amendment. RFRA's stated purposes are: (1) to restore the compelling-interest test as set forth in *Sherbert* and *Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or

defense to persons whose religious exercise is substantially burdened by the government. 42 U.S.C. § 2000bb(b). The Supreme Court has characterized RFRA as "adopt[ing] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006).

B. Factual Background and Procedural History[7]

We review here the following District Court opinions: two preliminary injunctions issued in *Geneva College v. Sebelius*, and a preliminary injunction and permanent injunction issued in the related cases of *Most Reverend David A. Zubik v. Sebelius* and *Most Reverend Lawrence T. Persico v. Sebelius*. The *Zubik* and *Persico* appeals were consolidated and now have also been consolidated with the *Geneva* appeal.

1. *Geneva* Appellee

Appellee Geneva College ("Geneva") is a nonprofit institution of higher learning established by the Reformed Presbyterian Church of North America. Geneva believes that it would be sinful and immoral for it to intentionally participate in, pay for, facilitate, enable, or otherwise support access to abortion (including emergency contraceptives Plan B and ella, and two intrauterine devices, all of which

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[7] The District Courts in these cases had jurisdiction pursuant to 28 U.S.C. § 1331, and this Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291, 1292(a)(1).

Geneva characterizes as causing abortion) because such participation violates religious prohibitions on murder. Geneva contracts with an insurance issuer for its student and employee health insurance plans.

2. *Geneva* District Court Opinions

The District Court granted Geneva's motion for a preliminary injunction with respect to its student plan on June 18, 2013, and enjoined the government from applying or enforcing 42 U.S.C. § 300gg–13(a)(4) and requiring that Geneva's student health insurance plan, its plan broker, or its plan insurer provide "abortifacients" contrary to Geneva's religious objections. (J.A. 35–36.) The District Court began by stating that the Supreme Court has cautioned courts to be reluctant to "dissect religious beliefs" when engaging in a substantial burden analysis. (J.A. 24 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)).)

The District Court concluded that Geneva had shown a likelihood of success on the merits with respect to the presence of a substantial burden under RFRA and found that three Supreme Court free exercise cases supported Geneva's argument regarding the presence of a substantial burden under RFRA. First, it noted that in *Yoder*, 406 U.S. at 234–35, 92 S.Ct. 1526, a state compulsory education law for children up to age sixteen, with a penalty of a criminal fine, violated the free exercise rights of the Amish plaintiffs. Second, in *Sherbert*, 374 U.S. at 410, 83 S.Ct. 1790, the state could not withhold unemployment benefits from a worker who

refused employment on the grounds that working Saturdays violated her religious beliefs. Third, in *Thomas*, 450 U.S. at 719, 101 S.Ct. 1425, the state could not deny unemployment benefits to a worker whose religious beliefs forbade his participation in manufacturing tanks for use by the military. The District Court interpreted these cases as standing for the proposition that these indirect burdens on religious exercise are substantial enough to be cognizable under RFRA. The District Court concluded that Geneva had only two choices under the regulations—either provide the objected-to coverage or drop its health insurance—and by being forced to choose between those two options, both repugnant to its religious beliefs,[8] Geneva faced a substantial burden.

The District Court then granted Geneva's second motion for a preliminary injunction, this time with respect to its employee plan, on December 23, 2013.

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[8] We recognize that the appellees believe providing health insurance to their employees and students is part of their religious commitments. The appellees urge, at most, that dropping their health insurance coverage would be a violation of their moral beliefs, but they do *not* argue that it would be, in and of itself, another substantial burden imposed on their religious exercise. (Geneva Br. at 5 ("To fulfill its religious commitments and duties in the Christ-centered educational context, the College promotes the spiritual and physical well-being and health of its employees and students. This includes the provision of general health insurance to employees and their dependants and the facilitation of a student health plan."); Zubik/Persico Br. at 6 ("As part of overseeing their affiliates and as part of Catholic social teaching, the Dioceses provide self-insured health plans for Diocesan entities, including the Affiliates.").)

The District Court again enjoined the government from enforcing 42 U.S.C. § 300gg–13(a)(4) and requiring that Geneva's employee health insurance plan, its plan broker, or its plan insurer provide "abortifacients" contrary to Geneva's religious objections. (J.A. 67–68.) The District Court concluded that Geneva had shown a likelihood of success on the merits as to the presence of a substantial burden because the self-certification process forced Geneva to facilitate access to services it finds religiously objectionable. First, the District Court emphasized that a court must assess the intensity of the coercion and pressure from the government, rather than looking at the merits of the religious belief. (J.A. 58 (citing *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir.2013), *cert. denied sub nom., Burwell v. Korte*, —— U.S. ——, 134 S.Ct. 2903, 189 L.Ed.2d 856 (2014), and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir.2013), *aff'd sub nom., Burwell v. Hobby Lobby Stores, Inc.*, —— U.S. ——, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014)).) The District Court analogized to cases involving the contraceptive coverage mandate for entities *not* eligible for the accommodation, such as the *Hobby Lobby* opinion in the Court of Appeals for the Tenth Circuit, which found that the substantial fines and penalties imposed on an entity that refused to offer health care coverage to its employees at all, or refused to provide coverage for the mandated preventive services, constituted a substantial burden.

The District Court was convinced by Geneva's explanation that, although Geneva must engage in the same conduct that it did before the ACA—

namely, notify the insurance carrier that it would not provide coverage for the objected-to services—the effect of that conduct is now different. Before the ACA, Geneva's notification resulted in its employees being unable to obtain coverage for contraceptive services; after the ACA, Geneva's employees are still provided access to the services as a matter of law. "Under the ACA, Geneva has two choices: (1) provide insurance coverage to its employees, which will result in coverage for the objected to services; or (2) refuse to provide insurance coverage for its employees, which will result in fines, harm to its employees' well-being and competitive disadvantages. Both options require Geneva to act contrary to its religious duties and beliefs." (J.A. 61 n. 12.)

Geneva argues that the District Court was correct that a substantial burden is present here because (1) complying with either the contraceptive coverage requirement or the accommodation would cause Geneva to "trigger," "facilitate," or be "complicit" in the commission of acts that it likens to abortion; and (2) the fines that Geneva faces for its refusal to comply with the contraceptive coverage requirement or the accommodation would pressure it to conform.

3. *Zubik/Persico* Appellees

Appellees in the *Zubik* and *Persico* cases include: the Bishop of Pittsburgh, David A. Zubik, and the Bishop of Erie, Lawrence T. Persico; the Diocese of Pittsburgh and the Diocese of Erie, both of which qualify for the exemption to the contraceptive

coverage requirement under 45 C.F.R. § 147.131(a); and Catholic Charities of the Diocese of Pittsburgh, Prince of Peace Center, St. Martin Center, and Erie Catholic Cathedral Preparatory School, which are all nonprofit organizations affiliated with the Catholic Church. The Catholic religious nonprofit organizations are controlled by their respective Dioceses and operate in accordance with Catholic doctrine and teachings. The Bishops oversee the management of the affiliated nonprofits with regard to adherence to Catholic doctrine. The Catholic faith prohibits providing, subsidizing, initiating, or facilitating insurance coverage for sterilization services, contraceptives, other drugs that the Catholic Church believes to cause abortion, and related reproductive educational and counseling services. The Dioceses provide self-insured health plans to the nonprofits and contract with third-party administrators to handle claims administration of the plans. As a result of their provision of coverage to the nonprofits, the Dioceses, which are otherwise exempt, must comply with the contraceptive coverage requirement as to the nonprofits.

4. *Zubik/Persico* District Court Opinions

The District Court issued a preliminary injunction that applied to both the *Zubik* and *Persico* cases on November 21, 2013, and converted that injunction into a permanent injunction on December 20, 2013.

The District Court characterized the issue before it as "whether [the appellees], being non-secular in nature, are likely to succeed on the merits of proving

that their right to freely exercise their religion has been substantially burdened by the 'accommodation' which requires the Bishops of two separate Dioceses ... to sign a form which thereby facilitates/initiates the provision of contraceptive products, services, and counseling." (J.A. 116.) The *Zubik/Persico* appellees conceded that they have provided similar information as is required by the self-certification form to their third-party administrator in the past. However, their past actions barred the provision of contraceptive products, services, or counseling. Now, under the ACA, this information will be used to "facilitate/initiate the provision of contraceptive products, services, or counseling—in direct contravention to their religious tenets." (*Id.*) Accordingly, the District Court concluded that the government is impermissibly asking the appellees for documentation for what the appellees sincerely believe is an immoral purpose, and thus "they cannot provide it." (J.A. 117.) In conclusion, the District Court acknowledged that the accommodation allows the appellees to avoid directly paying for contraceptive services by shifting responsibility for providing contraceptive coverage. Despite this fact, because the appellees had a sincerely held belief that this shift in responsibility did not exonerate them from the moral implications of the use of contraception, the accommodation imposed a substantial burden.

Furthermore, the District Court held that the differing application of the exemption and the accommodation—the former applying to the Catholic Church, and the latter applying to Catholic nonprofit organizations—has the effect of dividing the Catholic

Church, thereby imposing a substantial burden. "[T]he religious employer 'accommodation' separates the 'good works (faith in action) employers' from the 'houses of worship employers' within the Catholic Church by refusing to allow the 'good works employers' the same burden-free exercise of their religion" under the exemption. (J.A. 118.) The District Court questioned why religious employers who share the same religious tenets are not exempt, or why all religious employers do not fall within the accommodation, such that "even though [the appellees] here share identical, religious beliefs, and even though they share the same persons as the religious heads of their organizations, the heads of [the appellees'] service organizations may not fully exercise their right to those specific beliefs, when acting as the heads of the charitable and educational arms of the Church." (J.A. 118, 120.) The District Court concluded that "the religious employer 'exemption' enables some religious employers to completely eliminate the provision of contraceptive products, services, and counseling through the Dioceses' health plans and third parties," whereas "the religious employer 'accommodation' requires other religious employers (often times the same member with the same sincerely-held beliefs) to take affirmative actions to facilitate/initiate the provision of contraceptive products, services, and counseling—albeit from a third-party." (J.A. 120–21.)

The *Zubik/Persico* appellees argue that the District Court was correct in finding a substantial burden because (1) they interpret the accommodation to require them to authorize and designate a third party to add the objectionable

coverage to their plans, in violation of their sincerely held religious beliefs that they cannot provide or facilitate that coverage; and (2) the different scope of the religious employer exemption and the accommodation impermissibly splits the Catholic Church.

The government, as appellant in both the *Zubik/Persico* and *Geneva* appeals, argues that the District Courts were incorrect and the appellees are not subject to a substantial burden, because the submission of the form is not in itself burdensome and does not give rise to the coverage. Rather, *federal law* requires third parties—insurance issuers and third-party administrators—to provide coverage after the appellees refuse to provide contraceptive coverage themselves. By invoking the accommodation process, the appellees do not facilitate the provision of contraceptive coverage by third parties. Rather, the third parties providing coverage do so as a result of legal obligations imposed by the ACA.

II. DISCUSSION

A. Standard of Review

We employ a tripartite standard of review for preliminary injunctions. "We review the District Court's findings of fact for clear error. Legal conclusions are assessed de novo. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir.2013) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of*

Educ., 307 F.3d 243, 252 (3d Cir.2002)). The same framework applies to the review of a grant of a permanent injunction. *See United States v. Bell*, 414 F.3d 474, 477–78 (3d Cir.2005).[9] Because we conclude that the appellees have not demonstrated a likelihood of success on the merits of their RFRA claim, we need not reach the other prongs of the injunction analysis.

B. Likelihood of Success as to Substantial Burden

1. Trigger/Facilitation/Complicity Argument

We first must identify what conduct the appellees contend is burdensome to their religious exercise. It is not the act of filling out or submitting EBSA Form 700 itself. The appellees conceded at oral argument that the mere act of completing EBSA Form 700 does not impose a burden on their religious exercise.

The appellees' essential challenge is that providing the self-certification form to the insurance

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[9] "A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). It is the plaintiff's burden to establish every element in its favor. *P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC*, 428 F.3d 504, 508 (3d Cir. 2005). A permanent injunction requires actual success on the merits. *See Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001).

issuer or third-party administrator "triggers" the provision of the contraceptive coverage to their employees and students. The appellees reframed this proposition at oral argument, stating that the accommodation requires them to be "complicit" in sin. Appellees urge that there is a causal link between providing notification of their religious objection to providing contraceptive coverage and the offering of contraceptive coverage by a third party. That link, they argue, makes them complicit in the provision of certain forms of contraception, which is prohibited by their religious beliefs.

Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage. Through RFRA's adoption of the Supreme Court's pre-*Smith* free exercise jurisprudence, Congress has required qualitative assessment of the merits of the appellees' RFRA claims. *See Korte*, 735 F.3d at 705 (Rovner, J., dissenting).[10] "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program

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[10] We note that the *Korte* majority opinion may have been undermined by the later decision of the Court of Appeals for the Seventh Circuit in *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *petition for cert. filed*, No. 14-392 (Oct. 3, 2014). The majority opinion in *Notre Dame*, decided after *Korte* but before *Hobby Lobby*, analyzes the mechanics of the accommodation and weakens the *Korte* majority's urge for deference. This type of analysis remains good law after *Hobby Lobby*. *See Priests for Life*, 772 F.3d 229, 247 (D.C. Cir. 2014).

actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985). Furthermore, the Supreme Court has stated that "[a] governmental burden on religious liberty is not insulated from review simply because it is indirect; but the nature of the burden is relevant to the standard that the government must meet to justify the burden." *Bowen v. Roy*, 476 U.S. 693, 706–07, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (citation omitted). These principles were applied in *Lyng*, where the Supreme Court recognized that the Native American respondents' beliefs were sincere, and that the government's proposed actions would have severe adverse effects on their religious practice. However, the Court disagreed that the burden on the respondents' belief was "*heavy enough* to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the ... road to engage in timber harvesting in the ... [challenged] area." 485 U.S. at 447, 108 S.Ct. 1319 (emphasis added).

While the Supreme Court reinforced in *Hobby Lobby* that we should defer to the reasonableness of the appellees' religious beliefs, this does not bar our objective evaluation of the nature of the claimed burden and the substantiality of that burden on the appellees' religious exercise. This involves an assessment of how the regulatory measure actually works. Indeed, how else are we to decide whether the appellees' religious exercise is substantially burdened? "[T]here is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept [the appellees'] characterization of the

regulatory scheme on its face." *Mich. Catholic Conference & Catholic Family Servs.*, 755 F.3d 372, 385 (6th Cir.2014) (quoting *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F.Supp.3d 48, 71 (D.D.C.2013)). We may consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the appellees' exercise of religion—all without delving into the appellees' beliefs. *See, e.g., Korte*, 735 F.3d at 710 (Rovner, J., dissenting). For example, the court in *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C.Cir.2008), "[a]ccept[ed] as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegations, that his religious exercise is substantially burdened." The court further explained: "we conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise because he cannot identify any 'exercise' which is the subject of the burden to which he objects." *Id.*[11]

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[11] The Zubik/Persico appellees argue that we should not independently analyze the burdens imposed on them, or the substantiality of that burden, because the government stipulated to facts contained in the appellees' declarations—particularly, that the appellees believe that participation in the accommodation, including signing the self-certification form, facilitates moral evil in violation of Catholic doctrine. The appellees are mistaken, because the government's factual stipulation does not preclude this Court from determining the contours of the asserted burden or whether the burden is substantial.

The Supreme Court in *Hobby Lobby* evaluated whether the requirement to provide contraceptive coverage absent the accommodation procedure substantially burdened the religious exercise of the owners of closely-held, for-profit corporations. The issue of whether there is an actual burden was easily resolved in *Hobby Lobby,* since there was little doubt that the actual *provision* of services did render the plaintiffs "complicit." And in *Hobby Lobby,* the Court came to its conclusion that, *without any accommodation,* the contraceptive coverage requirement imposed a substantial burden on the religious exercise of the for-profit corporations, because those plaintiffs were required to either provide health insurance that included contraceptive coverage, in violation of their religious beliefs, or pay substantial fines.[12] *See* 134 S.Ct. at 2775–76; *see also*

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[12] Indeed, Justice Alito's majority opinion in Hobby Lobby comments favorably on the accommodation procedure at issue here, which separates an eligible organization from the objected-to contraceptive services:

> HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible

Priests for Life, 772 F.3d at 245. Here, the appellees are *not* faced with a "provide" or "pay" dilemma because they have a third option—notification pursuant to the accommodation—to avoid both providing contraceptive coverage to their employees and facing penalties for noncompliance with the contraceptive coverage requirement.

The appellees urge that a burden exists here because the submission of the self-certification form triggers, facilitates, and makes them complicit in the provision of objected-to services. But after testing that assertion, we cannot agree that the submission of the self-certification form has the effect the appellees claim. First, the self-certification form does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be otherwise provided by federal law. *Federal law*, rather than any involvement by the appellees in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services. As Judge Posner has explained, this is not a situation where the self-

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organization, the group health plan, or plan participants or beneficiaries."

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

Hobby Lobby, 134 S. Ct. at 2782 (alterations in original) (footnotes omitted) (citations omitted).

certification form enables the provision of the very contraceptive services that the appellees find sinful. Rather, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured plans, to cover contraceptive services." *Notre Dame,* 743 F.3d at 554. Thus, federal law, not the submission of the self-certification form, enables the provision of contraceptive coverage.

The Court of Appeals for the Sixth Circuit adopted Judge Posner's logic that the obligation to cover contraception is not triggered by the act of self-certification. Rather, it is triggered by the force of law—the ACA and its implementing regulations. *See Mich. Catholic Conference,* 755 F.3d at 387 ("Submitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage."). Most recently, and after the Supreme Court's opinion in *Hobby Lobby,* the Court of Appeals for the D.C. Circuit agreed with these courts' explanations of the mechanics of the accommodation. *See Priests for Life,* 772 F.3d at 252 ("As the Sixth and Seventh Circuits have also concluded, the insurers' or [the third-party administrators'] obligation to provide contraceptive coverage originates from the ACA and its attendant regulations, not from Plaintiffs' self-certification or alternative notice."). Thus, submitting the self-certification form means only that the eligible organization is not providing contraceptive coverage and will not be subjected to penalties. By

participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services.[13]

Moreover, the regulations specific to the *Zubik* and *Persico* appellees' self-insured plan are no different in this respect, and in no way cause the appellees to facilitate or trigger the provision of contraceptive coverage. Those Department of Labor regulations state that EBSA Form 700 "shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." 29 C.F.R. § 2510.3–16(b).

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[13] Geneva argues that there is no guarantee that its employees and students would obtain the objected-to contraceptive coverage if they were not enrolled in Geneva's health plans. Therefore, Geneva asserts, the obligation to provide contraceptive coverage arises only because it sponsors an employee or student health plan. Geneva cites the following passage from *Notre Dame* in support: "By refusing to fill out the form Notre Dame would subject itself to penalties, but Aetna and Meritain would still be required by federal law to provide the services to the university's students and employees unless and until their contractual relation with Notre Dame terminated." 743 F.3d at 554 (emphasis added). However, Geneva's argument is unavailing. The provision of contraceptive coverage is not dependent upon Geneva's contract with its insurance company. "Once [the appellees] opt out of the contraceptive coverage requirement, . . . contraceptive services are not provided to women because of [the appellees'] contracts with insurance companies; they are provided because federal law requires insurers and TPAs to provide insurance beneficiaries with coverage for contraception." Priests for Life, 772 F.3d at 253. "RFRA does not entitle [the appellees] to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled." Id. at 256.

The *Zubik/Persico* appellees argue that these regulations cause it to "facilitate" the provision of contraceptives because the signed self-certification form authorizes the third-party administrator to serve as the plan administrator. However, this purported causal connection is nonexistent. The eligible organization has no effect on the designation of the plan administrator; instead, it is *the government* that treats and designates the third-party administrator as the plan administrator under ERISA. *See Notre Dame*, 743 F.3d at 555. "[The appellees] submit forms to communicate their decisions to opt out, not to authorize [the third-party administrators] to do anything on their behalf. The regulatory treatment of the form as sufficient under ERISA does not change the reality that the objected-to services are made available because of the regulations, not because [the appellees] complete a self-certification." *Priests for Life*, 772 F.3d at 254–55. Indeed, this "opt-out" is just that—an indication that the eligible organization chooses not to provide coverage for the objected-to services.

Moreover, the submission of the self-certification form does not make the appellees "complicit" in the provision of contraceptive coverage. If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage. Ultimately, the regulatory notice requirement does not necessitate any action that interferes with the appellees' religious activities. "The organization must send a single sheet of paper honestly communicating its eligibility and sincere

religious objection in order to be excused from the contraceptive coverage requirement." *Id.* at 249. The appellees "need only reaffirm [their] religiously based opposition to providing contraceptive coverage, at which point third parties will provide the coverage separate and apart from [the appellees'] plan of benefits." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 7 F.Supp.3d 88, 104 (D.D.C.2013), *aff'd, Priests for Life*, 772 F.3d 229 (D.C.Cir.2014). The appellees' real objection is to what happens after the form is provided—that is, to the actions of the insurance issuers and the third-party administrators, required by law, once the appellees give notice of their objection. "RFRA does not grant [the appellees] a religious veto against plan providers' compliance with those regulations, nor the right to enlist the government to effectuate such a religious veto against legally required conduct of third parties." *Priests for Life*, 772 F.3d at 251. "The fact that the regulations require the insurance issuers and third-party administrators to modify their behavior does not demonstrate a substantial burden on the [appellees]." *Mich. Catholic Conference*, 755 F.3d at 389.[14]

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[14] A hypothetical example serves as a useful tool to demonstrate the fallacy in the appellees' characterization of the accommodation: Assume that a person, John Doe, has a job that requires twenty-four-hour coverage, such as an emergency room doctor or nurse. John Doe is unable to work his shift on a certain Tuesday, as that day is a religious holiday that mandates a day of rest. As a result, John Doe believes that it is inappropriate for anyone to work on that holiday. John Doe can request time off by filling out a certain form, but he will be penalized if he fails to show up for work without appropriately

Thus, we cannot agree with the appellees' characterization of the effect of submitting the form as triggering, facilitating, or making them complicit in the provision of contraceptive coverage. At oral argument, the appellees argued that it was not merely the filing of the form that imposed a burden, but, rather, what follows from it. But free exercise jurisprudence instructs that we are to examine the act the appellees must perform—not the effect of that act—to see if it burdens substantially the appellees' religious exercise. The Supreme Court has consistently rejected the argument that an independent obligation on a third party can impose a substantial burden on the exercise of religion in violation of RFRA, as we discuss below. Pre-*Smith* free exercise cases, which RFRA was crafted to resurrect, have distinguished between what a challenged law requires the objecting parties to do, and what it permits another party—specifically, the government—to do.

In *Bowen*, the Supreme Court determined that the Free Exercise Clause did not require the government to accommodate a religiously based objection to the statutory requirement that a Social Security number be provided to applicants for certain welfare benefits. Roy, a Native American,

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requesting time off. However, by filling out this form, he believes that he will facilitate or trigger or be complicit in someone else working in his place on the religious holiday. John Doe sincerely believes that the simple filling out of the time-off request imposes a substantial burden on his religious beliefs. In this example, John Doe, like the appellees, is able to express his religious objection to working on a religious holiday by declining to work that day.

argued that the government's use of his daughter's Social Security number would " 'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696, 106 S.Ct. 2147. Roy's claim was unsuccessful because "[t]he Federal Government's use of a Social Security number for ... [his daughter] d[id] not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion." *Id.* at 700, 106 S.Ct. 2147. Rather, Roy was attempting to use the Free Exercise Clause to dictate how the government should transact its business.

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." ... The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a

> right to dictate the conduct of the Government's internal procedures.

Id. at 699–700, 106 S.Ct. 2147 (quoting *Sherbert*, 374 U.S. at 412, 83 S.Ct. 1790 (Douglas, J., concurring)).

And, echoing the principles of *Bowen*, in *Lyng*, members of Native American tribes claimed that the federal government violated their rights under the Free Exercise Clause by permitting timber harvesting and construction on land used for religious purposes. 485 U.S. at 441–42, 108 S.Ct. 1319. The Supreme Court concluded that the Free Exercise Clause "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450–51, 108 S.Ct. 1319.

Building on this line of cases, the Court of Appeals for the D.C. Circuit concluded that a federal prisoner failed to state a RFRA claim when he sought to enjoin application of the DNA Analysis Backlog Elimination Act on the basis that DNA sampling, storage, and collection without limitations violated his religious beliefs about the proper use of the "building blocks of life." *Kaemmerling*, 553 F.3d at 674. Kaemmerling could not state a claim that his religious exercise was substantially burdened because he did not identify any religious exercise that was subjected to the burden to which he objected:

> The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue sample after the BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not "pressure [him] to modify his behavior and to violate his beliefs."

Id. at 679 (alteration in original) (quoting *Thomas*, 450 U.S. at 718, 101 S.Ct. 1425). "Like the parents in *Bowen*, Kaemmerling's opposition to government collection and storage of his DNA profile does not contend that any act of the government pressures him to change his behavior and violate his religion, but only seeks to require the government itself to conduct its affairs in conformance with his religion." *Id.* at 680.

Thus, the case law clearly draws a distinction between what the law may impose on a person over religious objections, and what it permits or requires a third party to do. Although that person may have a religious objection to what the government, or another third party, does with something that the law requires to be provided (whether it be a Social Security number, DNA, or a form that states that the person religiously objects to providing contraceptive coverage), RFRA does not necessarily permit that person to impose a restraint on another's

action based on the claim that the action is religiously abhorrent.

These cases confirm that we can, indeed should, examine the nature and degree of the asserted burden to decide whether it amounts to a substantial burden under RFRA. Furthermore, we must assess how the objected-to action relates to the appellees' religious exercise, and whether the appellees' objections focus on the action itself or the result of the action, i.e., the obligations placed upon a third party.

Far from "triggering" the provision of contraceptive coverage to the appellees' employees and students, EBSA Form 700 totally removes the appellees from providing those services. "[T]he regulations provide an opt-out mechanism that shifts to third parties the obligation to provide contraceptive coverage to which health insurance beneficiaries are entitled, and that fastidiously relieves [the appellees] of any obligation to contract, arrange, pay, or refer for access to contraception...." *Priests for Life*, 772 F.3d at 252. The self-certification form requires the eligible organization or its plan to provide a copy to the organization's insurance issuer or third-party administrator in order for the plan to be administered in accordance with both the eligible organization's religious objection and the contraceptive coverage requirement. The ACA already takes into account beliefs like those of the appellees and *accommodates* them. "The accommodation in this case consists in the organization's ... washing its hands of any involvement in contraceptive coverage, and the

insurer and the third-party administrator taking up the slack under compulsion of federal law." *Notre Dame,* 743 F.3d at 557. The regulations accommodate the interests of religious institutions that provide health services, while not curtailing the public interest that motivates the federally mandated requirement that such services shall be provided to women free of charge. *Id.* at 551.

Because we find that the self-certification procedure does not cause or trigger the provision of contraceptive coverage, appellees are unable to show that their religious exercise is burdened. Even if we were to conclude that there is a burden imposed on the appellees' religious exercise, we would be hard-pressed to find that it is substantial. Whether a burden is "substantial" under RFRA is a question of law, not a question of fact. *See Mahoney v. Doe,* 642 F.3d 1112, 1121 (D.C.Cir.2011). RFRA's reference to "substantial" burdens expressly calls for a qualitative assessment of the burden that the accommodation imposes on the appellees' exercise of religion. *Korte,* 735 F.3d at 705 (Rovner, J., dissenting). RFRA calls for a threshold inquiry into the nature of the burden placed on the appellees' free exercise of religion: "substantial" is a term of degree that invites the courts to distinguish between different types of burdens. *Id.* at 708.

We have stated that a substantial burden exists where (1) "a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other [persons] versus abandoning one of the precepts of his religion in order to receive a benefit"; or (2) "the

government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *See Washington v. Klem*, 497 F.3d 272, 280 (3d Cir.2007) (interpreting a related statute, the Religious Land Use and Institutionalized Persons Act, which applies to prisoner and land use cases). However, a government action does not constitute a substantial burden, even if the challenged action "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," if the government action does not coerce the individuals to violate their religious beliefs or deny them "the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449, 108 S.Ct. 1319. Under this definition, can the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a "substantial" burden on the appellees' free exercise of religion? We think not. While *Hobby Lobby* rejected the argument that the burden was too attenuated because the actual use of the objected-to contraceptive methods was a matter of individual choice, here, where the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees.

The reasoning of the District Courts was misguided in two ways. First, the District Courts accepted the appellees' characterization of the accommodation as causing them to "facilitate," act as the "central cog," or serve as the "necessary stimulus" for the provision of the objected-to

contraceptive services. (J.A. 60–61.) For the reasons we have detailed, we cannot accept that characterization as a matter of fact or law. Second, the District Courts focused on the coercive effect, i.e., the fact that the appellees faced a choice: submit the self-certification form and "facilitate" the provision of contraceptive coverage, or pay fines for noncompliance. However, now that we have dispelled the notion that the self-certification procedure is burdensome, we need not consider whether the burden is substantial, which involves consideration of the intensity of the coercion faced by the appellees. We will accordingly reverse the challenged injunctions.

2. Dividing the Catholic Church Argument in *Zubik/Persico*

The appellees in *Zubik/Persico* argue that a second substantial burden is imposed on their religious exercise in that the contraceptive coverage regulatory scheme improperly partitions the Catholic Church by making the Dioceses eligible for the exemption, while the Catholic nonprofits can only qualify for the accommodation, even though all the Catholic entities share the same religious beliefs. The District Court agreed with the appellees and concluded that the contraceptive mandate "would cause a division between the Dioceses and their nonprofit, religious affiliated/related spiritual/charitable/educational organizations which fulfill portions of Dioceses' mission. Further, any nonprofit, religious affiliated/related organizations expelled from the Dioceses' health insurance plans would require significant restructuring of the plans

which would adversely affect the benefits received from pooling resources." (J.A. 76 (citation omitted).) We conclude that the inclusion of houses of worship in the exemption and religious nonprofits in the accommodation does not impose a substantial burden on the *Zubik/Persico* appellees.

The definition of a "religious employer" who receives an exemption from the contraceptive coverage requirement under the regulations is based on longstanding Internal Revenue Code provisions. *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). "[R]eligious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560 (citation omitted) (citing *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 666, 672–73, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). The Departments chose this definition from the Internal Revenue Code to categorize the entities subject to the exemption and the accommodation because that provision was a bright line that was already statutorily codified and frequently applied: "The Departments believe that the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement." 78 Fed.Reg. at 39,874; *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed.Reg. 8456, 8461 (proposed Feb. 6, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590, and 45 C.F.R. pts. 147, 148, &

156) ("[T]his definition was intended to focus the religious employer exemption on 'the unique relationship between a house of worship and its employees in ministerial positions.' " (quoting Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed.Reg. 46,621, 46,623 (Aug. 3, 2011) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; and 45 C.F.R. pt. 147))).

Furthermore, we are not persuaded that the challenged accommodation poses any burden on the *exempted* appellees' religious exercise, particularly a burden that would require the appellees to "expel" the religious nonprofit organizations from the Dioceses' health insurance plans. *See, e.g., Roman Catholic Archdiocese of N.Y. v. Sebelius,* 987 F.Supp.2d 232, 252 (E.D.N.Y.2013) ("First, it is not at all clear why the Diocesan plaintiffs would have to 'expel' their non-exempt affiliates from their health plans.... Second, even if the law did pressure the Diocesan plaintiffs to 'expel' their affiliates, plaintiffs do not state that the Diocesan plaintiffs' religious beliefs require them to have all their affiliate organizations on a single health plan, such that 'expelling' the non-exempt affiliates would be an act forbidden by their religion.").

Thus, we cannot agree that the different treatment afforded to the Catholic Church as a house worship versus the Catholic nonprofit organizations imposes a substantial burden in violation of RFRA.

III. CONCLUSION

We will reverse the District Courts' orders granting the challenged injunctions. Because we conclude that the appellees have not shown a likelihood of success on the merits of their RFRA claim, based on the determination that the accommodation does not impose a substantial burden on their religious exercise, we need not reach the question of whether the accommodation is the least restrictive means of furthering a compelling governmental interest.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVA COLLEGE; WAYNE L. HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; and CARRIE E. KOLESAR,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

Case No. 2:12-cv-00207

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CONTI, District Judge

Pending before the court is a Motion for Preliminary Injunction (ECF No. 87), and brief in support, (ECF No. 88), filed by plaintiff Geneva College ("Geneva"), and the response in opposition, (ECF No. 89), filed by defendants Kathleen Sebelius, Hilda Solis, Timothy Geithner, the United States Department of Health and Human Services ("HHS"), the United States Department of Labor, and the United States Department of the Treasury (collectively, "defendants").

Geneva seeks an order protecting it from complying with the requirement that it include coverage for certain services as part of the health insurance that it provides to its students in the plan year beginning on August 1, 2013. Geneva objects to the requirement in the new health care law mandating that it provide insurance coverage for abortifacient products and contraceptives such as ella, Plan B, and intrauterine devices ("IUDs") (collectively, the "objected to services"). For purposes of the present motion, Geneva argues that the law requiring it to provide insurance coverage for the objected to services, 42 U.S.C. § 300gg-13(a)(4) (referred to generally as the "mandate"), violates the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (the "RFRA").

On March 6, 2013, the court issued a Memorandum Opinion and Order (ECF No. 74), granting in part and denying in part defendants' motion to dismiss the first amended complaint (ECF No. 32) filed by Geneva and plaintiffs Wayne L. Hepler, Carrie E. Kolesar, WLH Enterprises, and The Seneca Hardwood Lumber Company, Inc. (collectively, the "Hepler plaintiffs"). The court granted the motion to dismiss with respect to Geneva by finding that it lacked standing to challenge the mandate. The court denied the motion to dismiss with respect to the Hepler plaintiffs' claims pursuant to the RFRA and the Free Exercise Clause. Following entry of the court's Memorandum Opinion and Order, the Hepler plaintiffs filed a motion for a preliminary injunction. (ECF No. 75.) The court entered findings of fact and conclusions of law, (ECF No. 83), as well as an order preliminarily enjoining defendants from enforcing the mandate against the Hepler plaintiffs in part because the Hepler plaintiffs established a likelihood of success on the merits with respect to their RFRA claim. (ECF No. 84.)

Geneva filed a motion for reconsideration (ECF No. 81) on April 5, 2013, arguing that its claims are ripe for review because the proposed rules (discussed below) do not alleviate its religious exercise concerns and because of concerns that Geneva would be forced to contract for its student health insurance plan before defendants' final rules were implemented. The court granted Geneva's motion for reconsideration (ECF No. 86), and held that Geneva did have standing to challenge the mandate, and that its claims are ripe for review. The court also

denied defendants' motion to dismiss with respect to, among other claims, Geneva's RFRA claim.

Like the Hepler plaintiffs, Geneva advised the court that it does not desire an evidentiary hearing or oral argument on its motion and intends to proceed on the record and briefing that is presently before the court, and defendants did not object to so proceeding. (ECF No. 87 at 2.) Geneva indicated that the court must rule on its motion no later than June 20, 2013, so that it may continue to contract for its student health insurance plan for the 2013-14 plan year. To that end, the matter is ripe for disposition, and the court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT[15]

Geneva is a nonprofit institution of higher learning established in Beaver Falls, Pennsylvania

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[15] The findings of fact contained herein are derived from the allegations in the first amended complaint (ECF No. 32), which Timothy R. Baird, Geneva's Associate Vice President of Operations and Human Resources, avers in an affidavit (ECF No. 88-1) are true and correct with respect to Geneva. Where necessary, other factual averments are taken from the declaration of Kenneth A. Smith, Geneva's President, submitted in support of Geneva's motion for reconsideration. (ECF No. 81-1.) Defendants did not respond to, contest, or challenge the affidavits. The court, therefore, accepts those affidavits as true for the purposes of the present motion. See Williams v. Curtiss-Wright Corp., 681 F.2d 161, 163 (3d Cir. 1982) (noting that "[i]t has long been recognized that a preliminary injunction may issue on the basis of affidavits and other written evidence, without a hearing, if the evidence submitted by both sides does not leave unresolved any relevant factual issue").

in 1848 by the Reformed Presbyterian Church of North America ("RPCNA"). (ECF No. 32 ¶¶ 11, 25.) Geneva's mission is "to glorify God by educating and ministering to a diverse community of students in order to develop servant-leaders who will transform society for the kingdom of Christ." (Id. ¶ 25.) This mission is central to Geneva's institutional identity and activities. (Id. ¶¶ 27-29.) Geneva offers a traditional liberal arts and sciences curriculum as well as student programs and services that are rooted in the Christian faith. (Id. ¶ 26.) Pursuant to its mission and goals, Geneva has historically promoted a diverse student population and has opposed institutions (such as slavery) that it finds inimical to its beliefs. (Id. ¶¶ 34-35.)

Geneva is governed by a board of corporators and a board of trustees. (Id. ¶¶ 30-31.) Members of the board of corporators must be members of the RPCNA and members of the board of trustees must be members of either the RPCNA or some other Reformed or Evangelical Christian congregation. (Id. ¶ 30-31.) Geneva's faculty, staff and administration are drawn from among those who profess faith in Christ and who otherwise agree with the college's Christian convictions. (Id. at ¶ 32.) Geneva does not require its students to profess a particular faith, but it does give enrollment priority to evangelical Christians and requires all students to live by standards of Christian morality. (Id. at ¶ 33.)

Geneva and the RPCNA firmly believe "that the procurement, participation in, facilitation of, or payment for abortion [including the use of what it alleges are abortion-causing drugs like Plan B and

ella] violates the Commandment against murder." (Id. ¶43.) Geneva identifies several texts, including the Ten Commandments, Scripture, the articulated statements of the RPCNA, and the Westminster Larger Catechism in support of its view that human life begins at the moment of fertilization, and that any destruction of a human life thereafter constitutes murder. (Id. ¶¶ 38-44.) Geneva's Student Handbook expressly provides that abortion "'will not be tolerated.'" (Id. ¶ 49.) In furtherance of its views on abortion, Geneva's students and staff participate in a host of pro-life activities both on and off campus. (Id. ¶¶ 45-48.)

Geneva provides health insurance coverage to its employees and makes health insurance coverage available to its students. (Id. ¶ 51.) Geneva's student health plan does not enjoy "grandfathered status"[16] and its current plan year began on August 1, 2012. (Id. ¶¶ 73-74.)

If the court grants Geneva's motion, then Geneva will contract for a student health insurance plan for the 2013-2014 school year, which begins on August 1, 2013. (ECF No. 88-1 ¶ 6.) If the court denies Geneva's motion or does not rule until after June 20, 2013, then Geneva will not contract for a student

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[16] Grandfathered status is defined in 45 C.F.R. § 147.140; 26 C.F.R. § 54.9815-125T; and 29 C.F.R. § 2590.7151251, and provides that such plans do not have to provide coverage without cost sharing of "preventive health services," which plaintiffs allege includes "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." (ECF No. 32 ¶ 53.)

health insurance plan for the 2013-2014 school year. (Id. ¶ 7.) If the court grants Geneva's motion, then Geneva's student health plan insurer (United HealthCare) and insurance broker (First Risk Advisors) will provide Geneva with a student plan that excludes the abortifacients to which it objects. (Id. ¶¶ 5, 9.) Many of Geneva's students rely upon the school to provide a comparatively affordable health plan, and returning students expect that Geneva will once again make health insurance available to them for the 2013-2014 school year. (Id. ¶ 10.)

Geneva deems it sinful and immoral to facilitate a student health insurance plan that includes coverage for abortifacients and participation in such a plan that entitles students to access insurance coverage of abortifacients. (Id. ¶ 8.)

On approximately June 30, 2013, Geneva will send out invoices to students and their families for the fall 2013 semester and it must know at that time whether to bill students for health insurance. (Id. ¶¶ 3-4.) Geneva must notify its insurance broker and plan issuer no later than June 20, 2013 of its intent to enter into an agreement regarding a student health plan for the 2013-2014 school year. (Id. ¶ 5.)

Geneva currently requires that all full-time undergraduate students carry health insurance, and if they do not provide Geneva with proof of such insurance, they are enrolled in Geneva's student health insurance plan. (ECF No. 32 ¶ 70.) If Geneva is unable, for reasons of conscience, to facilitate a student health insurance plan for the 2013-2014

school year, Geneva students who would otherwise have participated in the school's student plan will be forced to obtain insurance elsewhere. (ECF No. 88-1 ¶ 11.)

II. CONCLUSIONS OF LAW

A. The Relevant Statutes and Regulations Concerning the Objected to Services

1. The Patient Protection and Affordable Care Act of 2010

On March 23, 2010, the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010) ("ACA"), became law and an overhaul of the nation's healthcare system began. Section 1001 of the ACA includes specific measures related to preventive care for women, and provides in part:

> (a) In general
>
> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> * * *
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services

> Administration ["HRSA"] for purposes of this paragraph.

42 U.S.C. § 300gg-13 (the "preventive care provision"). Because the ACA did not specifically identify which preventive care services would have to be provided without cost sharing, further rulemaking was necessary.

2. Preventive Care Services and Interim Final Regulations

On July 19, 2010, defendants (the Departments of Health and Human Services, Labor, and Treasury) issued interim final regulations implementing the preventive care provision. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA (the "first interim final regulations"), 75 FED. REG. 41,726 (Jul. 19, 2010). The first interim final regulations require all group health plans and health insurance issuers offering nongrandfathered[17] group or individual health coverage to cover, without cost sharing, the preventive care services outlined in 42 U.S.C. § 300gg-13. Id. at 41,728. The first interim

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[17] The preventive services provisions do not apply to health plans that are grandfathered. A plan is grandfathered if: (1) at least one person was enrolled on March 23, 2010; (2) the plan continuously covered at least one individual since that date; (3) the plan provides annual notice of its grandfathered status; and (4) the plan has not been subject to significant changes as outlined in the regulations. See 42 U.S.C. § 18011; 26 C.F.R. §§54.9815-1251T(a), (g); 29 C.F.R. §§ 2590.715-1251(a), (g); 45 C.F.R. §§ 147.140(a), (g).

final regulations directed the HHS, in conjunction with the Institute of Medicine ("IOM"), to determine what preventive services are necessary and beneficial for women's health and well-being. Id. The IOM was to report its findings to the Health Resources and Services Administration ("HRSA"), which was to issue the necessary guidelines. The report issued by the IOM[18] on July 19, 2011, recommended that the HRSA guidelines include, *inter alia*: "[t]he full range of Food and Drug Administration [("FDA")]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." IOM Report at 10. FDA-approved contraceptive methods include the objected to services, such as the drugs ella and Plan B, as well as IUDs.

3. HRSA Guidelines

On August 1, 2011, the HRSA adopted guidelines pursuant to the IOM recommendations[19] and on August 3, 2011, again issued interim final regulations (the "second interim final regulations"). Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 76 FED. REG. 46,621 (Aug. 3, 2011). The second interim final regulations carve out an exemption allowing certain religious employers to

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[18] INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS, available at http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (Last visited Apr. 17, 2013) ("IOM Report").

[19] The HRSA guidelines are available at http://www.hrsa.gov/womensguidelines/ (last visited Apr. 17, 2013).

avoid providing insurance coverage for the objected to services. 76 FED. REG. at 46,626 (codified at 45 C.F.R. § 147.130(a)(1)(iv)(B)). The exemption defines religious organizations as those employers that meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization;
>
> (2) The organization primarily employs persons who share the religious tenets of the organization;
>
> (3) The organization serves primarily persons who share the religious tenets of the organization;
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

The sections of the Internal Revenue Code cited in subsection (4) define nonprofit organizations as "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order" that are exempt from taxation pursuant to 26 U.S.C. § 501(a).

4. Temporary Enforcement Safe Harbor Provision

After allowing the public and interested groups to comment on the second interim final regulations, defendants adopted the definition of religious

employer contained in those regulations without change on February 15, 2012. Group Health Plans and Health Issuers Relating to Coverage of Preventive Services Under the ACA, 77 FED. REG. 8,725, 8,727-28 (Feb. 15, 2012). The adopted final regulations (the "final regulations") contain a temporary enforcement safe harbor provision for nongrandfathered plans that do not qualify for the religious employer exemption. Id. HHS issued supplemental guidance ("HHS Guidance") with respect to the safe harbor provision.[20] The safe harbor provision provides that defendants will not take any enforcement action against an employer, a group health plan, or a group health insurance issuer with respect to nonexempt, nongrandfathered group health plans that fail to cover some or all of the recommended preventive services "until the first plan year that begins on or after August 1, 2013." HHS Guidance, at 3. To qualify for the safe harbor provision, an organization must meet the following criteria:

> (1) The organization is organized and operates as a non-profit entity.
>
> (2) From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan established or

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[20] HHS, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing, at 3 (Feb. 10, 2012), available at http://cciio.cms.gov /resources/files/Files2 /02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Apr. 17, 2013).

> maintained by the organization, consistent with any applicable State law, because of the religious beliefs of the organization.
>
> (3) . . . [T]he group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) must provide [notice] to participants . . . which states that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
>
> (4) The organization self-certifies that it satisfies criteria 1-3 above, and documents its self-certification in accordance with the procedures detailed [elsewhere in the HHS Guidance].

HHS Guidance, at 3.

5. Advance Notice of Proposed Rulemaking

Following the adoption of the final regulations and the HHS Guidance in February 2012, defendants issued an Advance Notice of Proposed Rulemaking ("ANPRM") on March 21, 2012. Certain Preventive Services Under the ACA, 77 FED. REG. 16,501 (Mar. 21, 2012). The ANPRM seeks additional public comments and sets forth "questions and ideas" on how to best provide women with access to contraceptive services without cost-sharing, while accommodating the religious liberty concerns articulated by nonexempt religious organizations. Id. at 16,503. By its own terms, the ANPRM aims to

"protect . . . religious organizations from having to contract, arrange, or pay for contraceptive coverage." Id. The ANPRM provided a ninety-day comment period ending June 19, 2012. Id.

6. Updated Guidance

The HHS updated its guidance bulletin (the "Updated HHS Guidance") on August 15, 2012 by clarifying three points: "(1) that the safe harbor is also available to non-profit organizations with religious objections to some but not all contraceptive coverage . . .; (2) that group health plans that took some action to try to exclude or limit contraceptive coverage that was not successful as of February 10, 2012, are not for that reason precluded from eligibility for the safe harbor . . .; and (3) that the safe harbor may be invoked without prejudice by non-profit organizations that are uncertain whether they qualify for the religious employer exemption."[21] The safe harbor is aimed at providing an additional year—until the first plan year beginning on or after August 1, 2013—for health plans and health insurance issuers to comply with the preventive care requirement. Updated HHS Guidance at 3.

7. Proposed Rules

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[21] Department of Health and Human Services, Revised Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing, at n.1, available at http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Apr. 17, 2013) ("updated HHS Guidance").

On February 6, 2013, defendants issued proposed rules (the "proposed rules") broadening the universe of organizations eligible for an exemption from the contraceptive requirement. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 FED. REG. 8,456, 8,462 (Feb. 6, 2013). In the proposed rules, defendants proposed an accommodation for religious organizations that object to providing contraceptive coverage. The proposed rules exclude from the contraceptive requirement those organizations that meet certain criteria: (1) "The organization opposes providing coverage for some or all of the contraceptive services required to be covered under [the final regulations] on account of religious objections;" (2) "The organization is organized and operates as a nonprofit entity;" (3) "The organization holds itself out as a religious organization;" and (4) "The organization self-certifies that it satisfies the first three criteria." 78 FED. REG. at 8,462. In an effort to also accommodate those plan beneficiaries who may not share the beliefs of the organizations claiming the accommodation, the proposed rules also set forth proposed ways "to provide women with contraceptive coverage without cost sharing and to protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage to which they object on religious grounds." Id. at 8,462-64.

B. Claims Presented in the Amended Complaint

Geneva argues that the statutory scheme outlined above substantially burdens its religious beliefs by requiring it to provide or facilitate

coverage for the objected to services against its conscience. (ECF No. 32 ¶¶ 142, 149-51.) Geneva argues that the mandate burdens its employee and student recruitment efforts by creating uncertainty about whether or on what terms it will be able to offer or facilitate health insurance, which puts Geneva at a competitive disadvantage in its efforts to recruit and retain employees and students. (Id. ¶¶ 146-47.)

C. Preliminary Injunction Standard

The court considers four factors in determining whether to grant a preliminary injunction. A party seeking a preliminary injunction must show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." Kos Pharmaceuticals, Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004) (citing Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999)).

Although a party seeking preliminary injunctive relief must make "a clear showing that [it] is entitled to such relief," Winter v. Natural Res. Defense Council, 555 U.S. 7, 22 (2008), demonstrating a likelihood of success on the merits requires only that the party "prove a prima facie case, not a certainty that he or she will win." Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 173 (3d Cir. 2001) (citing 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL

PRACTICE AND PROCEDURE § 2948.3 (2d ed. 1995)).

1. Likelihood of Success on the Merits

a. Geneva's Claims Pursuant to the RFRA

Pursuant to the RFRA, the government may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). The government may, however, substantially burden the exercise of religion if the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Geneva bears the initial burden under the RFRA of establishing that application of the mandate would substantially burden a sincere religious exercise. O Centro, 546 U.S. at 426.

i. Substantial Burden

Under the RFRA, exercise of religion is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2 (citing 42 U.S.C. § 2000cc-5). The Supreme Court has cautioned courts to be reluctant to "dissect religious beliefs" when engaging in substantial burden analysis. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981). As the court acknowledged with respect to the Hepler

plaintiffs, it must tread lightly when considering whether the mandate's requirements substantially burden Geneva's exercise of religion.

A challenged law substantially burdens Geneva's free exercise of religion if it compels Geneva "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." Wisconsin v. Yoder, 406 U.S. 205, 218 (1972). A substantial burden also exists where a law "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." Thomas v. Review Bd., 450 U.S. at 718. Even "onerous" financial costs can rise to the level of a substantial burden. See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 392 (1990) (declining to find a substantial burden, but recognizing that one could exist under certain circumstances).

Defendants do not question the sincerity of Geneva's religious beliefs, but they do dispute whether the mandate's requirements impose a substantial burden on the exercise of those beliefs. Defendants argue that the mandate's requirements do not burden Geneva's exercise of religion because the regulations with respect to Geneva have not been finalized, and it would be "impossible for the Court to meaningfully evaluate whether the yet-to-be amended regulations will impose any burden—much less a substantial one—on Geneva's religious exercise." (ECF No. 89 at 1.) In essence, defendants' response sets forth the same argument[22] they

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[22] As the court already noted, defendants' argument that the proposed rules are not final does not alleviate the burdens

already raised in opposition to Geneva's motion for reconsideration (ECF No. 85), which this court recently granted. (ECF No. 86.) Geneva, for its part, argues that this court's prior ruling with respect to the Hepler plaintiffs' motion for preliminary injunction is applicable to its objections to the mandate, particularly in light of its stated opposition to the accommodation set forth in the proposed rules. (ECF No. 81-1 ¶ 3-4.) Because Geneva objects to the proposed rules as they currently stand, the court will grant Geneva's motion, allowing it to continue the process of contracting for a student health plan for the 2013-2014 plan year.

As this court previously noted, three Supreme Court decisions support Geneva's argument that there is a likelihood of success on the merits with respect to its assertion that it will suffer a substantial burden under the RFRA.[23] First, in

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Geneva is facing and will continue to face while it attempts to contract for health insurance, which it must do before the August 1, 2013 deadline for issuing defendants' final rules. In light of these facts, and Geneva's stated objections to the accommodation in the proposed rules (ECF No. 81-1 ¶ 3-4), defendants' argument lacks merit insofar as the court has already found that Geneva is currently suffering a real harm as a result of a ripe controversy. The court is, therefore, able to fashion appropriate injunctive relief that will allow Geneva to continue to plan for the upcoming student health plan year without fear that the proposed rules, as they currently stand, will be enforced against them.

[23] The Court of Appeals for the Third Circuit has instructed that courts should look to free exercise decisions issued prior to Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), when interpreting the RFRA, since it was enacted to codify the standard used prior to the Smith decision. Conestoga, 2013 WL 140110, at *10 n.13

Yoder, 406 U.S. at 234-35, the Supreme Court held that a state compulsory education law imposing criminal fines for failing to remain in school until age sixteen violated the free exercise rights of the Old Order Amish. Second, in Sherbert v. Verner, 374 U.S. 398, 410 (1963), the Supreme Court held that a state could not withhold unemployment benefits from a worker who refused employment on grounds that working on Saturdays violated the worker's religious beliefs. Third, in Thomas v. Review Board, 450 U.S. at 719, the Supreme Court again found that a state could not deny unemployment benefits to a worker who terminated his employment because his religious beliefs forbade his participation in the production of tanks. Like the Hepler plaintiffs, Geneva maintains that these decisions support its argument that even indirect burdens on religious exercise are substantial enough to be cognizable under the RFRA.

Under the proposed rules, Geneva is faced with having to choose between violating its deeply held religious beliefs and being forced to terminate its student health insurance coverage, which it alleges also burdens its religious exercise. (ECF No. 32 ¶¶ 116-24.) This kind of Hobson's choice is similar to that faced by the plaintiff in Sherbert, who was "force[d] . . . to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." Sherbert, 374 U.S. at 404. Here, Geneva is unable to

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(citing Adams v. Comm'r of Internal Revenue, 170 F.3d 173, 176 (3d Cir. 1999)).

enjoy the benefits of providing its students with health insurance that is free of the coverage for the objected to services. Geneva maintains that any objected to services provided under the accommodation proposed by defendants would not be "free" in the sense that any costs for such services would be passed on to it through "premiums and/or administrative charges." (ECF No. 32 ¶ 162.) If Geneva were forced to drop its student health insurance plan, it would equally frustrate Geneva's religious desire to support the physical well-being of its students. (Id. ¶ 51.) Like in Yoder, Geneva will suffer a financial hardship if it were forced to drop its student health plan because lack of such a plan will burden its student recruitment efforts, leading to reduced enrollment. (Id. ¶ 146); see Jimmy Swaggart Ministries, 493 U.S. at 392.

Thomas is also instructive with respect to defendants' previously asserted argument that the burden in the present case is too attenuated to be substantial. In addressing whether a pacifist's objection to war was too remote from his former occupation assembling tanks, the Supreme Court noted that "Thomas drew a line, and it is not for [the Court] to say that the line he drew was an unreasonable one." Thomas, 450 U.S. at 715. The Court instructed that "[c]ourts should not undertake to dissect religious beliefs" when analyzing substantial burden questions. Id. Here, Geneva facilitates the provision of its student health insurance, and to force it to choose whether or not to facilitate a student health plan would be, like in Thomas, a line which it should not be forced to cross.

Geneva explicitly objects to the requirement that it facilitate the objectionable coverage to its students, despite the accommodation proposed by defendants. (ECF No. 88-1 ¶ 8.) In light of this fact, Geneva will be forced to "modify [its] behavior and to violate [its] beliefs" by either giving up its student health insurance generally or providing the objectionable coverage. Thomas, 450 U.S. at 718. As discussed above, this is a quintessential substantial burden, and Geneva demonstrated that it is likely to succeed on the merits with respect to the substantial burden issue.

ii. Compelling Government Interest/Least Restrictive Means

Geneva demonstrated that it is likely to succeed in showing that the mandate's requirements impose a substantial burden on its exercise of religion, and now the court must determine whether the mandate's requirements serve "interests of the highest order." Yoder, 406 U.S. at 215. The government bears the burden of demonstrating a compelling interest at this stage, since "the burdens at the preliminary injunction stage track the burdens at trial." O Centro, 546 U.S. at 429-30 (analyzing the applicable burdens under the RFRA). Defendants do not make an argument with respect to this prong of the RFRA analysis beyond stating that the court's previous ruling with respect to the Hepler plaintiffs "cannot be extended to *different* regulations." (ECF No. 89 at 7 n.2.) Defendants have, therefore, failed to meet their burden. O Centro, 546 U.S. at 429-30. Nevertheless, to the

extent that defendants' previous arguments remain applicable, they will be discussed herein.

Defendants previously argued that the mandate's requirements serve two complementary compelling interests—namely the need to promote public health and the need to promote gender equality. Few would argue that promoting the public health is not a compelling government interest. See Mead v. Holder, 766 F. Supp. 2d 16, 43 (D. D.C. 2011) (acknowledging that, in the context of the ACA, "the Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets"). Geneva does not appear to seriously dispute that public health and gender equality can, in certain circumstances, be compelling government interests.

Geneva instead argues that defendants' proffered interests are too vague and general to satisfy a strict scrutiny analysis. In construing claims pursuant to the RFRA, courts must look "beyond broadly formulated interests justifying the general applicability of government mandates and [scrutinize] the asserted harm of granting specific exemptions to particular religious claimants." O Centro, 546 U.S. at 431. Under the RFRA, the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." Id. at 420 (citing 42 U.S.C. § 2000bb-1(b)). Defendants in the present case fail to show how exempting Geneva from the mandate will "seriously compromise [the government's] ability to

administer the program," particularly where defendants are actively trying to exempt entities like Geneva. Id. at 435.

In O Centro, the Supreme Court found that the government failed to make a showing that a ban on the use of a hallucinogenic substance served a compelling interest as applied to a Native American tribe that used the substance as part of its religious services. Id. at 439. The Court relied upon similar religious exemptions granted with respect to the use of peyote by "hundreds of thousands" of members of the Native American Church, and found that such broad exemptions weighed heavily against finding a compelling interest. Id. at 433-34. In light of the myriad exemptions to the mandate's requirements already granted, the requirement is "woefully underinclusive" and therefore does not serve a compelling government interest. Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002).

Several other courts addressing similar challenges to the mandate's requirements point out that over 190 million individuals have already been exempted from the mandate's requirements as a result of the grandfathering provisions in the ACA. E.g. Newland v. Sebelius, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012) ("[t]he government has exempted over 190 million health plan participants . . . from the preventive care coverage mandate"); Tyndale House, 2012 WL 5817323, at *18 ("Indeed, the 191 million employees excluded from the contraceptive coverage mandate include those covered by grandfathered plans **alone**." (emphasis in original)). Defendants argue that the grandfathering provision

is merely temporary, and is aimed at easing in the requirements imposed by the ACA.[24] While true, the mere fact that defendants granted such a broad exemption in the first place severely undermines the legitimacy of defendants' claim of a compelling interest.

In addition to the grandfathering exemption, the ACA contains several other provisions that explicitly or implicitly exclude many other individuals and entities from the mandate. First, the ACA recognizes an exemption for members of a "religious sect or division" that objects to accepting public or private insurance funds. 26 U.S.C. § 5000A(d)(2)(A).[25] Second, defendants exempted more traditional religious employers from the requirement under pressure from other religious groups. 76 FED. REG. at 46,625 (acknowledging that amendments to the interim final rules were necessary in light of comments by religious employers objecting to the

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[24] Defendants argue that 190 million is a "vast overstatement of the total number of individuals in grandfathered plans." (ECF No. 78 at 9 n.6.) Accepting the estimates provided by defendants, more than 90 million employees will remain exempt from the mandate by the end of 2013. See Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 FED. REG. 34,538, 34,552 (Jun. 17, 2010).

[25] Defendants argue that this provision does not apply to the mandate; however, the provision provides an exemption to the requirement that individuals maintain a certain level of health insurance coverage under the ACA. To the extent that those exempted individuals would otherwise purchase insurance pursuant to a group health plan that is subject to the mandate, they are, in essence, exempt from the mandate's requirements.

mandate). Third, in response to intense public pressure, defendants proposed rules in an attempt to broaden the religious institutions' exemption. 78 FED. REG. at 8,462. This exemption is most significant with respect to Geneva, since it is aimed directly at accommodating institutions exactly like it, even though Geneva argues that it does not go far enough toward protecting its religious interests. In light of these myriad exemptions, the "[mandate] cannot be regarded as protecting an interest 'of the highest order,'" particularly in a case like this where "it leaves appreciable damage to that supposedly vital interest unprohibited." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993). The tens of millions of individuals who remain unaffected by the mandate's requirements—including those institutions that have no objection to the accommodation—contradict any notion that the government's interests are as compelling as defendants argue.

As discussed above, defendants failed to meet their burden with respect to the compelling interest prong by failing to assert any applicable argument and the court will therefore end its analysis with that conclusion. O Centro, 546 U.S. at 429-30 (where the government fails to meet its burden under the compelling interest test, the court need not address the least restrictive means prong of the analysis).

2. Irreparable Harm to Geneva

Irreparable harm is an injury that cannot be adequately compensated at a later date in the ordinary course of litigation. The Supreme Court has

held, and defendants concede, that "[t]he loss of First Amendment freedoms," or a violation of the RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976).[26] This is particularly true when Geneva made a strong showing that is likely to succeed on the merits of its constitutional claim. See Trefelner v. Burrell Sch. Dist., 655 F. Supp. 2d 581, 596 (W.D. Pa. 2009) (citing 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995)).

As demonstrated by the discussion above, the court concludes that because coverage must be obtained by August 1, 2013 (before the proposed rules must be finalized), Geneva will be irreparably harmed if it is forced either to forgo providing student health insurance coverage or to violate its sincerely held religious beliefs by contracting for coverage that requires it to pay, albeit by indirect means, to include the objected to services in its student health care insurance. Because the harm Geneva will suffer is a result of at least a statutory violation, denial of the requested relief will result in the loss of vital religious freedoms, which "for even

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[26] As noted in Tyndale House, 2012 WL 5817323, at *18, the same rights are at issue in both the RFRA and in First Amendment cases, because RFRA "covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment. Id. (citing O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 995 (10th Cir. 2004), aff'd, 546 U.S. 429 (2006); see Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001) (citing Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996)).

minimal periods of time, unquestionably constitutes irreparable injury." Elrod, 427 U.S. 373. This factor weighs strongly in favor of granting the requested relief.

3. Irreparable Harm to Defendants

Defendants will suffer little, if any, harm should the requested relief be granted. Defendants have already granted significant exemptions to the mandate, and continue to exempt others for limited periods of time pursuant to the non-enforcement safe harbor provision. The requested relief in the present case will maintain the status quo until the statutory and constitutional questions raised by Geneva and other similarly-situated individuals and entities can be resolved. Kos Pharms., 369 F.3d at 708 (quoting Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 197 (3d Cir. 1990)).

As noted in the court's prior decision, defendants, in other cases involving challenges to the mandate, have acquiesced to the imposition of injunctive relief. Id. (citing Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-00092, ECF No. 41 (E.D. Mo. Mar. 11, 2013); Sioux Chief Mfg. Co. v. Sebelius, No. 4:13-cv-0036, ECF No. 9 (W.D. Mo. Feb. 28, 2013)); see also Hall v. Sebelius, No. 13-0295, ECF No. 10 (D. Minn. Apr. 2, 2013); Bick Holding, Inc. v. Sebelius, No. 4:13-cv-00462, ECF No. 18 (E.D. Mo. Apr. 1, 2013. Defendants cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in other cases. Because defendants are also in the process of seeking to accommodate institutions

just like Geneva, granting the present motion will simply maintain the status quo and will impose no hardship on defendants. In light of the exemptions granted, the attempts to accommodate Geneva, and defendants' position with respect to injunctive relief in other cases, defendants stand to suffer little harm and this factor weighs strongly in favor of granting the requested relief.

4. Public Interest

The public interest will likewise benefit if the court grants the requested relief, because "[t]here is a strong public interest in protecting fundamental First Amendment rights." Trefelner, 655 F. Supp. 2d at 598. That strong interest includes fundamental religious rights codified by statute in the RFRA. Kikumura, 242 F.3d at 963. "'As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.'" Ramsey v. City of Pittsburgh, 764 F. Supp. 2d 728, 734-35 (W.D. Pa. 2011) (citing Am. Tel. and Tel. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 n.8 (3d Cir. 1994)).

Apart from the broader policy reasons for granting Geneva's requested relief, pragmatic concerns dictate the same outcome. Forcing Geneva to drop its student health insurance out of fear that the current proposed regulations will continue to violate its religious beliefs will impose a substantial burden on those students who rely upon school-provided health insurance. (ECF No. 88-1 ¶¶ 10-11.)

This consideration, along with the public interest in preserving religious liberties, leads this factor to weigh heavily in favor of granting the requested relief.

5. Balancing Harms

Geneva showed that it is likely to succeed on the merits of its RFRA claim; that it will suffer irreparable harm absent injunctive relief; and that the public interest favors granting injunctive relief. In light of the exemptions granted and the position taken by defendants in other similar cases, the harm to defendants is not significant. These showings lead the court to conclude that the balance of the factors weighs heavily in favor of granting the requested relief.

III. CONCLUSION

For the reasons set forth herein, plaintiffs' motion for a preliminary injunction will be GRANTED. An appropriate order will follow.

June 18, 2013

BY THE COURT:

/s/ Joy Flowers Conti
Joy Flowers Conti
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVA COLLEGE; WAYNE L. HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; and CARRIE E. KOLESAR, *Plaintiffs,* v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants.*	Case No. 2:12-cv-00207

ORDER GRANTING PRELIMINARY INJUCTION

Upon consideration of the motion for preliminary injunction (ECF No. 87) by plaintiff Geneva College ("Geneva"), its memorandum and affidavits in support, the parties' briefing and oral argument on defendants' motion to dismiss, this court's Memorandum Opinion and Order dated March 6, 2013, and for the reasons set forth in the accompanying findings of fact and conclusions of law;

IT IS HEREBY ORDERED that Geneva's motion for preliminary injunction is hereby GRANTED;

IT IS FURTHER ORDERED that defendants, their agents, officers, and employees, are hereby ENJOINED from applying or enforcing the requirements imposed in 42 U.S.C. § 300gg-13(a)(4) by requiring that Geneva's student health insurance plan, its plan broker, or its plan insurer provide abortifacients contrary to Geneva's religious objections.

IT IS FURTHER ORDERED that the injunction hereby granted shall remain in effect until this court makes a full determination on the merits of the case, or the United States Supreme Court or United States Court of Appeals for the Third Circuit renders a decision on the merits of this case or an adverse decision in a substantially similar case, whichever occurs first; and

IT IS FURTHER ORDERED that a bond in the amount of zero (0) dollars is appropriate.

SO ORDERED.

Dated: June 18, 2013

BY THE COURT:

/s/ Joy Flowers Conti
Joy Flowers Conti
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVA COLLEGE; WAYNE L. HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; and CARRIE E. KOLESAR,
Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants.

Case No. 2:12-cv-00207

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CONTI, Chief District Judge

Pending before the court is the Second Motion for Preliminary Injunction (ECF No. 105), and brief in support and reply brief, (ECF No. 106 and 111), filed by plaintiff Geneva College ("Geneva"), and the response in opposition, (ECF No. 107), filed by defendants Kathleen Sebelius, Hilda Solis, Timothy Geithner, the United States Department of Health and Human Services ("HHS"), the United States Department of Labor, and the United States Department of the Treasury (collectively, "defendants").

Geneva seeks an order protecting it from complying with the requirement that it include coverage for certain preventative services as part of the health insurance it provides to its employees. Geneva objects specifically to the requirement that it provide insurance coverage for abortifacient products such as ella, Plan B, and intrauterine devices (collectively, the "objected to services").

For purposes of the present motion, Geneva argues that the law requiring it to provide insurance coverage for the objected to services, 42 U.S.C. § 300gg-13(a)(4) (referred to generally as the "Mandate"), violates the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (the "RFRA"). Under the RFRA, the government may not "substantially burden" a person's exercise of religion, unless the burden: (1) is in furtherance of a

compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(a) and (b).

Geneva advised the court that it does not desire an evidentiary hearing or oral argument on the instant motion and intends to proceed on the record and briefing that is presently before the court. (ECF No. 105 at 2.) Defendants did not object to proceeding in this manner. As it did with respect to both of the prior motions for preliminary injunctive relief, the court will proceed without an evidentiary hearing or oral argument. Williams v. Curtiss-Wright Corp., 681 F.2d 161, 163 (3d Cir. 1982) (noting that "[i]t has long been recognized that a preliminary injunction may issue on the basis of affidavits and other written evidence, without a hearing, if the evidence submitted by both sides does not leave unresolved any relevant factual issue").

Geneva indicated that the court must rule on its motion no later than December 31, 2013, so that it may continue to contract for its employee health insurance plan for the 2014-15 plan year, which is scheduled to begin on January 1, 2014. The matter is ripe for disposition.

I. Procedural Background

The court previously issued findings of fact and conclusions of law, and entered orders preliminarily enjoining defendants from enforcing the Mandate against the Hepler plaintiffs, (ECF Nos. 83 and 84), and against Geneva with respect to

its student health insurance plan, (ECF Nos. 91 and 92), in part because plaintiffs established a likelihood of success on the merits with respect to their RFRA claims. Geneva College v. Sebelius, 941 F.Supp.2d 672, 680- 86 (W.D. Pa. 2013) (Hepler injunction); Geneva College v. Sebelius, -- F.Supp.2d --, 2013 WL 3071481, at *10-11 (W.D. Pa. Jun. 18, 2013) (Geneva student plan injunction).[27]

Since the court entered those two preliminary injunction orders three significant events occurred: (1) defendants filed interlocutory appeals in the Court of Appeals for the Third Circuit from both preliminary injunction orders. Geneva College, et al. v. Secretary United States Department of Health and Human Services, et al., Nos. 13-2814 and 13-3536 (3d Cir. 2013); (2) the relevant federal agencies issued rules finalizing the self-certification procedure to be followed by religious-based organizations which object to providing coverage for certain preventative services, such as contraceptives and abortion-inducing drugs or devices (the "Final Rules"). Coverage of Certain Preventative Services Under the Affordable Care Act, 78 FED. REG. 39,870-39,899 (Jul. 2, 2013), available at 2013 WL 3294256; and (3) the United States Supreme Court granted certiorari in two

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[27] The court also issued lengthy memorandum opinions with respect to defendants' motion to dismiss, (ECF No. 74), and Geneva's motion for reconsideration, (ECF No. 86), which not only addressed foundational issues, such as standing and ripeness, but also substantively analyzed the substantial burden and compelling interest elements of plaintiffs' RFRA claims. (ECF No. 74 at 36-43); Geneva College v. Sebelius, 929 F.Supp.2d 402, 430-35 (W.D. Pa. 2013).

cases in which for-profit, secular closely-held corporations alleged that the Mandate violates the RFRA. Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356, 2013 WL 5297800 (U.S. Nov. 26, 2013), and Sebelius v. Hobby Lobby Stores, Inc., No. 13-354, 2013 WL 5297798 (U.S. Nov. 26, 2013).

A. The Interlocutory Appeals

Defendants' interlocutory appeals from this court's orders preliminarily enjoining enforcement of the Mandate against the Helper plaintiffs and Geneva's student health insurance plan are pending before the Court of Appeals for the Third Circuit at Appeal Numbers 13-2814 (Hepler injunction) and 13-3536 (Geneva student plan injunction). Geneva College, et al. v. Secretary United States Department of Health and Human Services, et al., Appeal Nos. 13-2814 and 13-3536 (3d Cir. 2013). The court of appeals consolidated the cases.

The Hepler plaintiffs recently filed a motion in the court of appeals asking that their case be held in abeyance pending the Supreme Court's decision in Conestoga Wood. (Appeal No. 13-2814, Doc. 003111466403 at 1.) Geneva did not file a companion motion, but did not object to also holding its case in abeyance. (Id. at 2-3.) In response, defendants argued that the appellate court should immediately vacate the Hepler injunction pursuant to the court of appeals' controlling decision in Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377 (3d Cir. 2013), which held that a for-profit, secular, closely-held corporation could not assert a RFRA challenge to the Mandate. (Appeal No. 13-2814, Doc.

003111472846 ¶ 1.) With respect to the appeal from the Geneva injunction, defendants suggested that the appellate court hold the matter in abeyance for ninety days so that any appeal resulting from this court's disposition of the instant motion could be consolidated with the already-pending appeal concerning Geneva's student plan. (Id. ¶ 2.) The Hepler plaintiff's motion was referred to a motions panel of the court of appeals on December 11, 2013. (Appeal No. 13-2814, at Doc. 003111478999). Although opening briefs were due January 13, 2014, briefing is stayed pending disposition of this motion. (Id.)

Although neither party addresses this court's ability to decide the instant motion while these appeals are pending, the court independently examined the scope of its jurisdiction under these circumstances. An interlocutory appeal does not divest the district court of jurisdiction. United States v. Price, 688 F.2d 204, 215 (3d Cir. 1982) (citing 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3921.2 (2d ed. 1995)). This court retains the ability to proceed with those matters not involved in the appeal. New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1350 (2d Cir. 1989). The two preliminary injunction orders subject to appeal do not address application of the Final Rules to Geneva's employee health plan. For this reason, the present motion raises novel issues and this court retains jurisdiction to decide the instant motion.

B. The Final Rules

This summer, various federal agencies issued the Final Rules implementing the Mandate. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 FED. REG. at 39,870 (Jul. 2, 2013), available at 2013 WL 3294256. The Final Rules were issued on June 28, 2013, published in the Federal Register on July 2, 2013, and became effective on August 1, 2013. 78 FED. REG. at 39,870; (ECF No. 98 ¶ 145.) The Final Rules include two concessions for religious-based employers that object to providing coverage for the contraceptive services and devices required by the Mandate: (1) an absolute exemption for certain religious employers, such as churches and their related auxiliaries and associations; and (2) a self-certification accommodation for nonprofit organizations that hold themselves out as a religious organization. 78 FED. REG. at 39,873-78.

Under the latter accommodation, if a nonprofit, religious organization, objects to providing contraceptive services due to a religious objection, it can execute a self-certification form, which notifies its insurance carrier that the organization refuses to provide coverage for certain preventative services, such as the objected to services. 78 FED. REG. at 39,874-75; 45 C.F.R. § 147.131(b). Upon receipt of a self-certification form, the insurer must offer the objected to services to employees without direct or indirect cost to the employee or the organization. 78 FED. REG. at 39,875-77; 45 C.F.R. § 147.131(c)(2)(ii) and (d). This process is referred to herein as the

"eligible organization accommodation" or the "self-certification process."[28]

Plaintiffs filed a second amended complaint on October 18, 2013, which added allegations relating to the Final Rules, including, specifically, the eligible organization accommodation's self-certification process. (ECF No. 98 ¶¶ 145-82.)

C. Supreme Court Appeals and Recent Case Law

In November 2013, the United States Supreme Court granted two petitions for a writ of certiorari in cases filed by for-profit, secular, closely-held corporations seeking to prevent enforcement of the Mandate against company health plans on the basis of the owners' religious beliefs. Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356, 2013 WL 5297800 (U.S. Nov. 26, 2013), and Sebelius v. Hobby Lobby Stores, Inc., No. 13-354, 2013 WL 5297798 (U.S. Nov. 26, 2013). In Conestoga Wood the Court of Appeals for the Third Circuit held that Conestoga Wood Specialties could not assert a RFRA claim because corporations have no First Amendment free exercise rights, and the rights of the individual owners could not pass through to the corporation. Conestoga Wood Specialties Corp. v.

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[28] This accommodation is also reflected in the Treasury Department's regulations, 78 FED. REG. at 39,892, 26 C.F.R. § 54.9815-2713A, and the Labor Department's regulations, 78 FED. REG. at 39,894-95, 29 C.F.R. § 2590.713-2715A. The court refers only to the amended regulations of the Department of Health and Human Services. 78 FED. REG. at 39,896-97, 45 C.F.R. § 147.131(c)(2)(ii) and (d).

Sebelius, 724 F.3d 377 (3d Cir. 2013). In contrast, in Hobby Lobby, the Court of Appeals for the Tenth Circuit held that corporations have First Amendment free exercise rights, and, as a result, Hobby Lobby could assert a RFRA claim. The court of appeals went on to conclude that the Mandate imposed a substantial burden on the corporation's free exercise rights, which could not be justified by any compelling state interest. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013). The Supreme Court consolidated the Conestoga Wood and Hobby Lobby appeals. The publicly available docket does not reflect a briefing schedule, although customary Supreme Court procedure would dictate that the parties' opening merits briefs be filed in mid-January and mid-February, with petitioner's reply brief due in mid-March. The Supreme Court docket does reflect that amicus curiae briefs, in support of any party, must be filed by January 28, 2014. It does not appear that the Supreme Court will hear oral argument on these cases before the March 2014 sitting.

Three other courts of appeals have recently ruled on the same, or very similar, issues as were decided in Conestoga Wood and Hobby Lobby:

(1) In Autocam Corp. v. Sebelius, the Court of Appeals for the Sixth Circuit held that a for-profit, secular, closely-held corporation could not assert a RFRA challenge to the Mandate because it was not a "person" within the meaning of the statute. Autocam Corp. v. Sebelius, 730 F.3d 618, 625-26 (6th Cir. Sep. 17, 2013). In reaching this holding, the court emphasized that the free

exercise rights of "religious entities" are different than those of for-profit, secular corporations. Id. at 627. The Court of Appeals for the Third Circuit made this same distinction. Conestoga Wood, 724 F.3d at 385-86, discussed, infra p. 21.

(2) In Gilardi v. United States Department of Health and Human Services, the Court of Appeals for the District of Columbia Circuit held that a for-profit, secular, closely-held corporation did not possess free exercise rights, and could not assert a RFRA claim, but that the owners of the corporation unquestionably possessed such individual rights and could assert them under the RFRA. Gilardi v. United States Department of Health and Human Services, 733 F.3d 1208, 1212-16 (D.C. Cir. Nov. 1, 2013). The court of appeals concluded that the Mandate substantially burdened the owners' religious exercise, and could not survive the compelling government interest/least restrictive means test set forth in the RFRA. Id. at 1216-24.

(3) In Korte v. Sebelius, the Court of Appeals for the Seventh Circuit held that for-profit, secular, closely-held corporations were "persons" within the statutory language of the RFRA. Korte v. Sebelius, 735 F.3d 654, 673-82 (7th Cir. Nov. 8, 2013). The appellate court concluded that the Mandate substantially burdened the plaintiffs' exercise of religion and failed the RFRA's compelling government interest/least restrictive means test. Id. at 682-87.

Although the Supreme Court will address a RFRA challenge to the Mandate, neither of the cases under consideration, nor any of the appellate decisions set forth above, involve a nonprofit, religious organization's challenge to the eligible organization accommodation and its self-certification process. The court is unaware of any court of appeals to have considered such a challenge. Three federal district courts have considered such a challenge to date. Two of those courts held that the eligible organization accommodation's self-certification process violates the RFRA. The Roman Catholic Archdiocese of New York v. Sebelius, -- F.Supp.2d --, No. 12-2541, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); Zubik v. Sebelius, -- F.Supp.2d --, Nos. 13-1459 (Pitts.) and 13-303 (Erie), 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (J. Schwab). The other district court held that the accommodation did not violate the RFRA, or any Constitutional provision. Priests for Life, et al. v. United States Dep't of Health and Human Services, -- F.Supp.2d --, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013).

II. FINDINGS OF FACT[29]

Geneva is a nonprofit institution of higher learning established in Beaver Falls, Pennsylvania, in 1848 by the Reformed Presbyterian Church of North America ("RPCNA"). (ECF Nos. 91 at 3; 98 ¶¶

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[29] The findings of fact contained herein are derived from the court's previous findings of fact, (ECF Nos. 83 and 91), as well as the allegations of the second amended complaint (ECF No. 98). Because the factual background has not changed, many of the factual findings are identical to those made with respect to Geneva's previous preliminary injunction motion.

12, 25.) Geneva's mission is "to glorify God by educating and ministering to a diverse community of students in order to develop servant-leaders who will transform society for the kingdom of Christ." (ECF Nos. 91 at 3; 98 ¶ 25.) This mission is central to Geneva's institutional identity and activities. (ECF Nos. 91 at 3; 98 ¶¶ 27-29.) Geneva offers a traditional liberal arts and sciences curriculum as well as student programs and services that are rooted in the Christian faith. (ECF Nos. 91 at 3-4; 98 ¶ 26.) Pursuant to its mission and goals, Geneva has historically promoted a diverse student population and has opposed institutions (such as slavery) that it finds inimical to its beliefs. (ECF Nos. 91 at 4; 98 ¶¶ 36-37.)

Geneva is governed by a board of corporators and a board of trustees. (ECF Nos. 91 at 4; 98 ¶¶ 30, 33.) Members of the board of corporators must be members of the RPCNA and members of the board of trustees must be members of either the RPCNA or some other Reformed or Evangelical Christian congregation. (Id.) Geneva's faculty, staff, and administration are drawn from among those who profess faith in Christ and who otherwise agree with the college's Christian convictions. (ECF Nos. 91 at 4; 98 ¶ 34.) Geneva has approximately 350 employees, about 280 of which are full-time. (ECF No. 98 ¶ 39.) There are approximately 95 full-time faculty members. (Id.) Geneva does not require its students to profess a particular faith, but it does give enrollment priority to Evangelical Christians and requires all students to live by standards of Christian morality. (ECF Nos. 91 at 4; 98 ¶ 35.)

Geneva and the RPCNA firmly believe "that the procurement, participation in, facilitation of, or payment for abortion [including the use of what it alleges are abortion-causing drugs like Plan B and ella] violates the Commandment against murder." (ECF Nos. 91 at 4; 98 ¶ 45.) Geneva identifies several texts, including the Ten Commandments, Scripture, the articulated statements of the RPCNA, and the Westminster Larger Catechism in support of its view that human life begins at the moment of fertilization, and that any destruction of a human life thereafter constitutes murder. (ECF Nos. 91 at 4; 98 ¶¶ 40-46.) Geneva's Student Handbook expressly provides that abortion "will not be tolerated." (ECF Nos. 91 at 4; 98 ¶ 51.) In furtherance of its views on abortion, Geneva's students and staff participate in a host of pro-life activities both on and off campus. (ECF Nos. 91 at 4; 98 ¶¶ 47-50.)

Geneva provides health insurance coverage to its employees and makes health insurance coverage available to its students. (ECF Nos. 91 at 5; 98 ¶ 52.) Geneva considers providing health care to its employees to be part of its religious duty. (ECF No. 98 ¶ 52.) Geneva's contract for employee health coverage states that it excludes "[a]ny drugs used to abort a pregnancy." (ECF No. 98 ¶ 54.) The next plan year for the employee health plan is scheduled to begin on January 1, 2014. (Id. ¶ 53.) Although Geneva is permitted to exclude morally objectionable abortion-inducing drugs and devices from its current employee health insurance plan under the Temporary Enforcement Safe Harbor provision, that provision will expire with respect to Geneva's employee plan when the new plan year commences

on January 1, 2014. (ECF No. 106 at 1 n.1); 78 FED. REG. 39,870, 39,872.

Without the relief requested, Geneva will be forced to choose between: (a) violating its religious convictions by acquiescing to a government requirement that it facilitate, access to abortion-inducing drugs and devices; and (b) violating its religious convictions by cancelling all health care coverage for its employees. (ECF No. 111 at 1.) Geneva's religious convictions forbid it from participating in providing free access to the objected to services through its employee health care plan. (ECF No. 98 ¶ 186.) Geneva has a religious duty to provide for the well-being of its employees and their families. (Id. at ¶¶ 52, 183-84.) Because Geneva has more than 50 full-time employees, it is required under the ACA to provide health insurance to its employees or incur substantial penalties, or be subject to legal action. (ECF No. 98 ¶ 39, 109-10); 26 US.C. §§ 4980D(b)(1) and H(c)(1); 29 U.S.C. § 1132; 42 U.S.C. § 18011. Dropping its employee health insurance plan would not only violate Geneva's religious duty to provide for its employee's well-being, but also subject Geneva to crippling penalties and place Geneva at a severe competitive disadvantage in its efforts to recruit and retain employees. (ECF No. 98 ¶¶ 9, 52, 109, 183-84, 187, 197.)

III. CONCLUSIONS OF LAW

A. The Relevant Statutes and Regulations Concerning the Objected to Services

1. The Patient Protection and Affordable Care Act of 2010

On March 23, 2010, the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010) ("ACA"), became law and an overhaul of the nation's healthcare system began. Section 1001 of the ACA includes specific measures related to preventive care for women, and provides in part:

> (a) In general
>
> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> * * *
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ["HRSA"] for purposes of this paragraph.

42 U.S.C. § 300gg-13 (the "preventive care provision"). Because the ACA did not specifically identify which preventive care services would have

to be provided without cost sharing, further rulemaking was necessary.

2. Preventive Care Services and Interim Final Rules

On July 19, 2010, defendants (the Departments of Health and Human Services, Labor, and Treasury) issued interim Final Rules implementing the preventive care provision. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA (the "first interim Final Rules"), 75 FED. REG. 41,726 (Jul. 19, 2010). The first interim Final Rules required all group health plans and health insurance issuers offering nongrandfathered[30] group or individual health coverage to cover, without costsharing, the preventive care services outlined in 42 U.S.C. § 300gg-13. Id. at 41,728. The first interim Final Rules directed the HHS, in conjunction with the Institute of Medicine ("IOM"), to determine what preventive services are necessary and beneficial for women's health and wellbeing. Id. The IOM was to report its findings to the Health Resources and Services

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[30] The preventive services provisions do not apply to health plans that are grandfathered. A plan is grandfathered if: (1) at least one person was enrolled on March 23, 2010; (2) the plan continuously covered at least one individual since that date; (3) the plan provides annual notice of its grandfathered status; and (4) the plan has not been subject to significant changes as outlined in the regulations. See 42 U.S.C. § 18011; 26 C.F.R. §§54.9815-1251T(a), (g); 29 C.F.R. §§ 2590.715-1251(a), (g); 45 C.F.R. §§ 147.140(a), (g). There is no dispute that Geneva's employee health plan is not entitled to grandfather status.

Administration ("HRSA"), which was to issue the necessary guidelines. The report issued by the IOM[31] on July 19, 2011, recommended that the HRSA guidelines include, *inter alia* : "[t]he full range of Food and Drug Administration [("FDA")]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." IOM Report at 10. FDA-approved contraceptive methods include the objected to services, such as the drugs ella and Plan B, as well as intrauterine devices.

3. HRSA Guidelines

On August 1, 2011, the HRSA adopted guidelines pursuant to the IOM recommendations[32] and on August 3, 2011, again issued interim Final Rules (the "second interim Final Rules"). Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 76 FED. REG. 46,621 (Aug. 3, 2011). The second interim Final Rules carved out an exemption allowing certain religious employers to avoid providing insurance coverage for the objected to services. 76 FED. REG. at 46,626 (codified at 45 C.F.R. § 147.130(a)(1)(iv)(B)). The "religious employer exemption" defines religious organizations as those employers that meet the following criteria:

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[31] INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS, available at http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited Dec. 19, 2013) ("IOM Report").

[32] The HRSA guidelines are available at http://www.hrsa.gov/womensguidelines/ (last visited Dec. 19, 2013).

(1) The inculcation of religious values is the purpose of the organization;

(2) The organization primarily employs persons who share the religious tenets of the organization;

(3) The organization serves primarily persons who share the religious tenets of the organization;

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

The sections of the Internal Revenue Code cited in subsection (4) define nonprofit organizations as "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order" that are exempt from taxation pursuant to 26 U.S.C. § 501(a).

4. Temporary Enforcement Safe Harbor Provision

After allowing the public and interested groups to comment on the second interim Final Rules, defendants adopted the definition of religious employer contained in those regulations without change on February 15, 2012. Group Health Plans and Health Issuers Relating to Coverage of Preventive Services Under the ACA, 77 FED. REG. 8,725, 8,727-28 (Feb. 15, 2012). These regulations

contained a temporary enforcement safe harbor provision for nongrandfathered plans that do not qualify for the religious employer exemption. Id. HHS issued supplemental guidance ("HHS Guidance") with respect to the safe harbor provision.[33] The safe harbor provision provides that defendants will not take any enforcement action against an employer, a group health plan, or a group health insurance issuer with respect to nonexempt, nongrandfathered group health plans that fail to cover some or all of the recommended preventive services "until the first plan year that begins on or after August 1, 2013." HHS Guidance, at 3. To qualify for the safe harbor provision, an organization must meet the following four criteria:

> (1) The organization is organized and operates as a nonprofit entity.
>
> (2) From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan established or maintained by the organization, consistent with any applicable State law, because of the religious beliefs of the organization.

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[33] HHS, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing (reissued bulletin), at 3 (Feb. 10, 2012), available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventiveservices-guidance-6-28-2013.pdf (last visited Dec. 19, 2013).

> (3) . . . [T]he group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) must provide [notice] to participants . . . which states that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
>
> (4) The organization self-certifies that it satisfies criteria 1-3 above, and documents its self-certification in accordance with the procedures detailed [elsewhere in the HHS Guidance].

HHS Guidance, at 3.

5. Advance Notice of Proposed Rulemaking

Following the adoption of the regulations and the HHS Guidance in February 2012, defendants issued an Advance Notice of Proposed Rulemaking ("ANPRM") on March 21, 2012. Certain Preventive Services Under the ACA, 77 FED. REG. 16,501 (Mar. 21, 2012). The ANPRM sought additional public comments and set forth "questions and ideas" on how to best provide women with access to contraceptive services without cost-sharing, while accommodating the religious liberty concerns articulated by nonexempt religious organizations. Id. at 16,503. By its own terms, the ANPRM aimed to "protect . . . religious organizations from having to contract, arrange, or pay for contraceptive coverage." Id. The

ANPRM provided a ninety-day comment period ending June 19, 2012. Id.

6. Updated Guidance

The HHS updated its guidance bulletin (the "Updated HHS Guidance") on August 15, 2012 by clarifying three points: "(1) that the safe harbor is also available to nonprofit organizations with religious objections to some but not all contraceptive coverage . . .; (2) that group health plans that took some action to try to exclude or limit contraceptive coverage that was not successful as of February 10, 2012, are not for that reason precluded from eligibility for the safe harbor . . .; and (3) that the safe harbor may be invoked without prejudice by nonprofit organizations that are uncertain whether they qualify for the religious employer exemption."[34] The safe harbor was aimed at providing an additional year—until the first plan year beginning on or after August 1, 2013—for health plans and health insurance issuers to comply with the preventive care requirement. Updated HHS Guidance at 3.

7. Proposed Rules

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[34] Department of Health and Human Services, Revised Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing, at n.1, available at http://wayback.archive-it.org/2744/20130514175209/http://cciio.cms.gov/resources/files/prevservices-guidance-08152012.pdf (last visited Dec. 19, 2013) ("updated HHS Guidance").

On February 6, 2013, defendants issued proposed rules (the "proposed rules") broadening the universe of organizations eligible for an exemption from the contraceptive requirement. Coverage of Certain Preventive Services under the Affordable Care Act, 78 FED. REG. 8,456, 8,462 (Feb. 6, 2013). In the proposed rules, defendants recommended an accommodation for religious organizations that object to providing contraceptive coverage. The proposed rules exclude from the contraceptive requirement those organizations that meet certain criteria:

> (1) The organization opposes providing coverage for some or all of the contraceptive services required to be covered under [the Final Rules] on account of religious objections;
>
> (2) The organization is organized and operates as a nonprofit entity;
>
> (3) The organization holds itself out as a religious organization; and
>
> (4) The organization self-certifies that it satisfies the first three criteria.

78 FED. REG. at 8,462. In an effort to also accommodate those plan beneficiaries who may not share the beliefs of the organizations claiming the accommodation, the proposed rules also set forth possible ways "to provide women with contraceptive coverage without cost sharing and to protect eligible organizations from having to contract, arrange, pay,

or refer for contraceptive coverage to which they object on religious grounds." Id. at 8,462-64.

8. Final Rules

On June 28, 2013, the pertinent federal agencies issued the Final Rules. 78 FED. REG. at 39,870-39,899. The Final Rules modify the language used to define an exempt "religious employer" to be "an organization that is organized and operates as a nonprofit entity and is referred to in § 6033(a)(3)(A)(1) or (iii) of the Internal Revenue Code of 1986, as amended." 78 FED. REG. at 39,874; 45 C.F.R. § 147.131(a). Because the Internal Revenue Code sections list churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order, the new language used did not change the substance of the exemption. 26 U.S.C. § 6033(a)(3)(A)(i) and (iii). These employers are absolutely exempt from the Mandate.

The Final Rules include the same accommodation for "eligible organizations" that originally appeared in the February 6, 2013 proposed rules, and make it applicable to all group health plans for plan years beginning on or after January 1, 2014. 78 FED. REG. at 8,462, 38,872, 39,874-75; 45 C.F.R. § 147.131(b). The Final Rules utilize the same four criteria set forth in the proposed rules to determine whether an entity qualifies as an "eligible organization," thus allowing it to take advantage of the "self-certification" work-around:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under s 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.....

45 C.F.R. § 147.131(b). A self-certification form must be signed by an authorized representative of the organization and provided to the organization's insurer. Id. at § 147.131(b)(4). Upon receipt of the self-certification form, the group health insurer must notify plan participants of the availability of separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv). Id. at § 147.131(d). Such payments are to be made without any cost-sharing requirements or premium, fee, or other charge to the eligible organization, the group health plan, or the plan participants or beneficiaries. Id. at § 147.131(c)(2); 78 FED. REG. at 39,879-80.

B. Claims Presented in the Second Amended Complaint

Geneva avers that the Final Rules' self-certification requirement substantially burdens its religious exercise by requiring it to act as the "sole trigger" of access to the objected to services. (ECF No. 98 ¶¶ 139, 159-60, 167, 174, 179, 181-82, 186, 188-90.) According to Geneva, under the self-certification accommodation, Geneva is the "central cog" in the government's scheme to expand access to the objected to services, against its conscience and religious beliefs. (Id. ¶ 140.) Geneva asserts that it would play a central role in facilitating free access to the objected to services by coordinating notices with and providing employee information to its insurer. (Id. ¶¶ 160, 162, 164-65, 167.) Geneva argues that the Final Rules burden its employee recruitment and retention efforts by putting it at a competitive disadvantage were it to choose not to offer health insurance, rather than violate its beliefs by participating in the self-certification process. (Id. ¶¶ 187.) Geneva avers that eliminating health care coverage entirely would result in the imposition of significant monetary penalties, and would, itself, violate its religious duty to provide for the well-being of its employees and their families. (ECF No. 98 ¶¶ 52, 109-10, 183.)

C. Preliminary Injunction Standard

The court considers four factors in determining whether to grant a preliminary injunction. A party seeking a preliminary injunction must show: "(1) a likelihood of success on the merits;

(2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." Kos Pharmaceuticals, Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004) (citing Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999)).

Although a party seeking preliminary injunctive relief must make "a clear showing that [it] is entitled to such relief," Winter v. Natural Res. Defense Council, Inc., 555 U.S. 7, 22 (2008), demonstrating a likelihood of success on the merits requires only that the party "prove a prima facie case, not a certainty that he or she will win." Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 173 (3d Cir. 2001) (citing 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.3 (2d ed. 1995)).

1. Likelihood of Success on the Merits

a. **Geneva's** Claim Pursuant to the RFRA

Pursuant to the RFRA, the government may not "substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). The government may, however, substantially burden the exercise of religion if the burden: "(1) is in

furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Geneva bears the initial burden under the RFRA of establishing that application of the Mandate would substantially burden a sincere religious exercise. O Centro, 546 U.S. at 426.

Before proceeding the court must consider the effect, if any, that the Court of Appeals for the Third Circuit's precedential decision in Conestoga Wood has on the court's substantive analysis of Geneva's RFRA claim. Conestoga Wood, 724 F.3d 377 (3d Cir. 2013). Although the court of appeals' decision was issued more than three months before the first brief on the instant motion was filed, neither party cited to it. Defendants cite only to the district court opinion in that case. (ECF No. 107 at 4-5.)

To reiterate, in Conestoga Wood, the Court of Appeals for the Third Circuit held that a for-profit, secular, closely-held corporation could not assert a RFRA claim because courts have not historically provided First Amendment free exercise protection to corporations. Conestoga Wood, 724 F.3d at 384. In doing so, the court explicitly distinguished the "rights of religious organizations." Id. at 385-86. The holding in Conestoga Wood applies, by its own language, only to certain for-profit, secular, closely-held corporations,[35] which the court distinguished

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[35] This court previously noted the limited scope of the holding in Conestoga Wood in denying defendants' motion for an indicative ruling. Geneva College v. Sebelius, No. 12-207, 2013

from "religious organizations." The appellate court did not decide on which side of the ledger nonprofit, non-secular corporations would fall. For this reason, Conestoga Wood does not conclusively bar this court's consideration of Geneva's RFRA claim.

Given that defendants presuppose Geneva's right to bring a claim pursuant the RFRA in this case, and given that the eligible employer accommodation is premised on this same fundamental presumption, the court will proceed with a substantive analysis of Geneva's claim. Korte, 735 F.3d at 674-75 (noting that the religious employer exemption and self-certification accommodation assume that certain religious organizations have free exercise rights, but noting that the lines drawn by the government are "nowhere to be found in the text of RFRA," and recognizing that the government analogizes these exemptions and accommodations to exemptions for religious employers under the Americans with Disabilities Act, 42 U.S.C. § 12113(d)(1)-(2), and Title VII, 42 U.S.C. § 2000e-2).

i. Substantial Burden

Under the RFRA, exercise of religion is defined as "any exercise of religion, whether or not

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WL 5704948 (W.D. Pa. Oct. 18, 2013). This court found that the court of appeals' decision in Conestoga Wood did not require that the Hepler injunction be vacated because the corporate structure of the Hepler corporate plaintiffs differed from Conestoga Wood Specialties Corp., and because Conestoga did not consider claims brought by individual family member-employees. Id. at *2.

compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2 (citing 42 U.S.C. § 2000cc-5). The Supreme Court has cautioned courts to be reluctant to "dissect religious beliefs" when engaging in a substantial burden analysis. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981). As the court acknowledged in its previous orders and factual and legal findings, a court must tread lightly when considering whether the mandate's requirements substantially burden Geneva's exercise of religion. (ECF Nos. 83 at 12 and 91 at 12-13); Geneva College, 2013 WL 3071481, at *7; Geneva College, 941 F.Supp.2d at 681. The court's role is not to decide whether the commands of one's faith have been correctly perceived; instead, it is enough that a claimant has an "honest conviction" that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion. Korte, 735 F.3d at 683 (quoting Thomas, 450 U.S. at 716). Two appellate courts considering the exact Mandate at issue in this case explained that a court must assess the intensity of the coercion and pressure from the government, not the merit of the belief. Korte, 735 F.3d at 683; Hobby Lobby, 723 F.3d at 1137.

A challenged law substantially burdens Geneva's free exercise of religion if it compels Geneva "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." Wisconsin v. Yoder, 406 U.S. 205, 218 (1972). A substantial burden also exists where a law "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." Thomas, 450 U.S. at 718. Even "onerous" financial costs can rise to the

level of a substantial burden. See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 392 (1990) (declining to find a substantial burden, but recognizing that one could exist under certain circumstances). The courts of appeals to reach the merits of RFRA challenges to the Mandate specifically found that the substantial fines and penalties imposed upon an entity that either refuses to offer health care coverage to its employees at all, or refuses to provide coverage for the mandated preventative services constitutes a substantial burden. Korte, 735 F.3d at 683-84; Gilardi, 733 F.3d at 1217-18; Hobby Lobby, 723 F.3d at 1140-41.[36]

Defendants do not question the sincerity of Geneva's religious beliefs, but they do dispute whether the Mandate and the Final Rules impose a substantial burden on the exercise of those beliefs. Defendants argue that the Final Rules' self-certification accommodation does not substantially burden Geneva's exercise of religion because it requires Geneva to do no more than submit a form informing its insurer that it refuses to provide

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[36] In Priests for Life, the district court explained, based on targeted supplemental briefing submitted by the government after oral argument, that if an eligible organization refuses to take advantage of the self-certification accommodation process, its insurer has an independent legal obligation under the ACA to *include* the objected to services in the organization's group policy. Priests for Life, 2013 WL 66722400, at * 3 n.2. In other words, an eligible organization's refusal to complete the self-certification process does not result in a $100 per employee, per day fine for failing to provide coverage for the objected to services; it results in the organization actually paying, through its group health insurance policy, for the objected to services. Id.

coverage to its employees for contraceptive services and ensures that Geneva is not responsible for contracting, arranging, paying, or referring for such coverage. (ECF No. 109 at 11.) Defendants contend that Geneva need not modify its behavior in any way under the Final Rules because Geneva would notify its insurer of this refusal before the ACA became law. (Id. at 11, 19.) Defendants assert that the self-certification accommodation "require[s] virtually nothing of Geneva" making any burden on Geneva de minimus, and that, in any event, any burden on Geneva's free exercise rights is too attenuated to qualify as substantial. (Id. at 11, 18.)

Geneva argues that this court's prior rulings with respect to the Hepler plaintiffs' motion for a preliminary injunction and Geneva's motion for a preliminary injunction concerning its student health plan dictate that Geneva's instant motion be granted. (ECF No. 106 at 1, 2.) Geneva emphasizes that this court previously rejected defendants' attenuation argument and ruled that the self-certification accommodation, which at the time was only a proposal, did not eliminate the Mandate's substantial burden on Geneva's religious desire to avoid complicity in grave moral evil. (Id. at 2, 7; ECF No. 111 at 8); Geneva College, 2013 WL 3071481, at *7-9. Geneva explains that under the Final Rules it is forced to become the "central cog" in "facilitating access" to the objected to services because the services only become available to its employees if Geneva: (1) offers a health insurance plan to its employees, as it is now required by law to do; and (2) submits the self-certification form to its insurer, which itself, by law, requires that the objected to

services will be provided to employees. (ECF No. 106 at 5-6.)[37]

In its reply brief, Geneva responds directly to defendants' claim that Geneva is required to do no more than it did before the Mandate became law, i.e, notify an insurer of its refusal to provide coverage for the objected to services. Geneva convincingly explains that the consequence of its prior notification was that its employees could not obtain coverage for the objected to services, while the consequence of the Final Rules' self-certification notification is that its employees must be provided access to the objected to services. See Archdiocese of N.Y., 2013 WL 6579764, at *14 & n.11 (noting that the self-certification form transforms a voluntary act that plaintiffs believe to be consistent with their religious beliefs into a compelled act that they believe forbidden); Zubik, 2013 WL 6118696, at *25 (analogizing that a person might be willing to provide a neighbor with a knife to cut meat, but not to commit murder). The purpose for which the notification is provided, and the compulsion to file it, makes all the difference.[38]

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[37] According to briefing filed by the government in Priests for Life, under the ACA, Geneva's employees will obtain insurance coverage for the objected to services so long as Geneva offers a health insurance plan to its employees, because if Geneva refuses to execute a self-certification form, then Geneva's insurer is required, by law, to include the objected to services in the group plan, *at Geneva's expense*. See supra note 10.

[38] For this reason, the court respectfully disagrees with the district court's conclusion, in Priests for Life, that the self-certification process cannot substantially burden an eligible organization's religious exercise because it "need not do anything more than it did prior to the promulgation of

Geneva is correct that, under the authority of Thomas, this court previously rejected defendants' recurrent argument that the burden in the present case is too attenuated to be substantial. Geneva College, 2013 WL 3071481, at *9. Defendants identified no change in factual or legal circumstances that would compel a different result here. The court is again convinced by Geneva's well-founded argument that its submission of the self-certification form is not too attenuated from the provision of the objected to services. Instead, it is the necessary stimulus behind their provision. See Korte, 735 F.3d at 684-85 (rejecting attenuation argument); Gilardi, 733 F.3d at 1217-18 (same); Hobby Lobby, 723 F.3d at 1189-90 (same). Courts should not undertake to dissect religious beliefs and second-guess where an objector draws the line when analyzing substantial burden questions. Hobby Lobby, 723 F.3d at 1141. Here, Geneva draws the line at providing health insurance to its employees that includes coverage for the objected to services. The Mandate forces Geneva to facilitate access to the

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the challenged regulations – this is, to inform its issuer that it objects to providing contraceptive coverage." Priests for Life, 2013 WL 6672400, at *7. Prior to the ACA, the result of that notification was that employees could not obtain insurance coverage for the objected to services. After the ACA, the result of that notification is that employees must be provided insurance coverage for those same services. Under the ACA, Geneva has two choices: (1) provide insurance coverage to its employees, which will result in coverage for the objected to services; or (2) refuse to provide insurance coverage for its employees, which will result in fines, harm to its employees' well-being, and competitive disadvantages. Both options require Geneva to act contrary to its religious duties and beliefs. See supra p. 11.

objected to services through the self-certification process. The court previously found that this is a not a line that the government can compel Geneva to cross. The court makes the same finding again.

In granting preliminary injunctive relief to the Hepler plaintiffs and to Geneva with respect to its student plan, this court explained how the Supreme Court's decisions in Yoder, Sherbert and Thomas supported a finding that the Mandate, including the self-certification accommodation, imposed a substantial burden under the RFRA. As it was under the proposed rules, under the Final Rules, Geneva is faced with having to choose between violating its deeply held religious beliefs and terminating its employee health insurance coverage entirely in order to avoid the ACA's regulatory scheme, which it alleges also burdens its religious duty to care for the well-being of its employees, and will, in any event, result in substantial fines. (ECF No. 98 ¶¶ 109-10, 183.); Thomas, 450 U.S. at 718. Like in Yoder, Geneva will suffer a severe, direct financial hardship if forced to drop its employee health plan because of the fines that would be imposed on it. Geneva will also suffer indirect hardship in that a burden would be placed on its efforts to recruit and retain employees if it fails to offer health insurance at all. (ECF No. 98 ¶ 187); see Jimmy Swaggart Ministries, 493 U.S. at 392. These burdens are substantial.

The court concludes, again, that Geneva demonstrated that it is likely to succeed on the merits with respect to the substantial burden issue.

ii. Compelling Government Interest/Least Restrictive Means

Because Geneva demonstrated that it is likely to succeed in showing that the Mandate's and the Final Rules' requirements impose a substantial burden on its exercise of religion, the court must determine whether these requirements serve "interests of the highest order." Yoder, 406 U.S. at 215. The government bears the burden of demonstrating a compelling interest at this stage, since "the burdens at the preliminary injunction stage track the burdens at trial." O Centro, 546 U.S. at 429-30 (analyzing the applicable burdens under the RFRA). Defendants assert that the Mandate and the self-certification accommodation of the Final Rules advance the compelling government interest in safeguarding public health and ensuring that women have equal access to health care. (ECF. No. 109 at 15.) These can be compelling governmental interests. (ECF No. 91 at 16-17.) Defendants concede, however, as they must, that this court previously concluded that a previous version of the regulations, which furthered the same governmental interests, did not satisfy strict scrutiny "[i]n light of the myriad exemptions" applicable to the Mandate. (Id. at 17-19.) Defendants, therefore, relegate their arguments in this regard to a footnote "merely to preserve them for appeal." (ECF No. 109 at 27 n.11.)

Given defendants' concession, and given that they failed to identify any factual or legal distinctions between the current circumstances and the court's prior rulings, defendants cannot establish that the Mandate and the Final Rules serve a

compelling governmental interest. In particular, even though this deficiency in their position was identified in this court's prior rulings, defendants still fail to show how exempting Geneva from the mandate will "seriously compromise [the government's] ability to administer the program," particularly where defendants have exempted religious employers and are actively trying to exempt entities like Geneva. O Centro, 546 U.S. at 435. The "myriad exemptions" to the Mandate's requirements still exist and demonstrate that the requirement is "woefully underinclusive" and therefore does not serve a compelling government interest. Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002).

2. Irreparable Harm to Geneva

Irreparable harm is an injury that cannot be adequately compensated at a later date in the ordinary course of litigation. The Supreme Court has held, and defendants concede, that "[t]he loss of First Amendment freedoms," or a violation of the RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). This is particularly true when Geneva made a strong showing that is likely to succeed on the merits of its RFRA claim. See Trefelner v. Burrell Sch. Dist., 655 F.Supp.2d 581, 596 (W.D. Pa. 2009) (citing 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995)).

As demonstrated by the discussion above, the court concludes that because coverage must be obtained by January 1, 2014, Geneva will be irreparably harmed if it is forced either to forgo providing employee health insurance coverage or to violate its sincerely held religious beliefs by contracting for coverage that requires it to facilitate the provision of the objected to services to its employees. Although the fines imposed on Geneva should it chose to cancel its employee health insurance entirely could be compensable by monetary relief, the detrimental effect on Geneva's recruitment and retention of employees by doing so, not to mention on the health and well-being of its employees, would be irreparable. This factor weighs strongly in favor of granting the requested relief.

3. Irreparable Harm to Defendants

Defendants will suffer little, if any, harm should the requested relief be granted. Defendants have already granted significant exemptions to the Mandate. The requested relief in the present case will maintain the status quo until the statutory and constitutional questions raised by Geneva and other similarly-situated individuals and entities can be resolved. Kos Pharms., 369 F.3d at 708 (citing Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 197 (3d Cir. 1990)). In that vein, although the court already found that the court of appeals' decision in Conestoga Wood does not control this case, the Supreme Court's imminent consideration of that case, and Hobby Lobby, could provide guidance to this court and to the Court of

Appeals for the Third Circuit on some of the relevant questions to be answered on the merits.

As noted in the court's prior decisions, defendants, in other cases involving challenges to the Mandate, have acquiesced to the imposition of injunctive relief. (ECF No. 91 at 20.) Defendants cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in other cases. In light of these considerations, defendants stand to suffer little harm and this factor weighs strongly in favor of granting the requested relief.

4. Public Interest

The public interest will likewise benefit if the court grants the requested relief, because "[t]here is a strong public interest in protecting fundamental First Amendment rights." Trefelner, 655 F.Supp.2d at 598. That strong interest includes fundamental religious rights codified by statute in the RFRA. Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001). "'As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.'" Ramsey v. City of Pittsburgh, 764 F.Supp.2d 728, 734-35 (W.D. Pa. 2011) (citing Am. Tel. and Tel. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 n.8 (3d Cir. 1994)).

Apart from the broader policy reasons for granting Geneva's requested relief, pragmatic concerns dictate the same outcome. Forcing Geneva to drop its employee health insurance out of fear

that the Final Rules, which Geneva asserts violate its religious beliefs, will impose a substantial burden on its employees, and their dependents, who rely upon employer provided health insurance. (ECF No. 91 at 22.) This consideration, along with the public interest in preserving religious liberties, leads this factor to weigh heavily in favor of granting the requested relief.

5. Balancing Harms

Geneva showed that it is likely to succeed on the merits of its RFRA claim; that it will suffer irreparable harm absent injunctive relief; and that the public interest favors granting injunctive relief. In light of the exemptions granted and the position taken by defendants in other similar cases, the harm to defendants is not significant. These showings lead the court to conclude that the balance of the factors weighs heavily in favor of granting the requested relief.

IV. CONCLUSION

For the reasons set forth herein, Geneva's motion for a preliminary injunction will be GRANTED. An appropriate order will follow.

Dated: December 23, 2013

BY THE COURT:

/s/Joy Flowers Conti
Joy Flowers Conti
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVA COLLEGE; WAYNE L. HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; and CARRIE E. KOLESAR,
Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants.

Case No. 2:12-cv-00207

ORDER GRANTING PRELIMINARY INJUCTION

Upon consideration of the motion for preliminary injunction (ECF No.1 05) by plaintiff Geneva College ("Geneva"), its memorandum in support, the parties' briefing, and this court's prior opinions, orders and findings of fact and conclusions of law (ECF Nos. 74, 83, 91), and for the reasons set forth in the accompanying findings of fact and conclusions of law;

IT IS HEREBY ORDERED that Geneva's motion for preliminary injunction is hereby GRANTED;

IT IS FURTHER ORDERED that defendants, their agents, officers, and employees, are hereby ENJOINED from applying or enforcing the requirements imposed in 42 U.S.C. § 300gg-13(a)(4) by requiring that Geneva's employee health insurance plan, its plan broker, or its plan insurer provide abortifacients contrary to Geneva's religious objections.

IT IS FURTHER ORDERED that the injunction hereby granted shall remain in effect until this court makes a full determination on the merits of the case, or the United States Supreme Court or United States Court of Appeals for the Third Circuit renders a decision on the merits of this case or an adverse decision in a substantially similar case, whichever occurs first; and

IT IS FURTHER ORDERED that a bond in the amount of zero (0) dollars is appropriate.

SO ORDERED.

Dated: December 23, 2013

BY THE COURT:

/s/Joy Flowers Conti
Joy Flowers Conti
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-3536 and14-1374

GENEVA COLLEGE; WAYNE HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 13-3536

GENEVA COLLEGE; WAYNE L. HEPLER, in his personal capacity and as owner and operator of the sole proprietorship WLH Enterprises; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14–1374

(District Court Nos.: 2-12-cv-00207 and 2-12-cv-00207)

PETITION FOR REHEARING

Present: McKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ and KRAUSE, Circuit Judges and SLOVITER*, Senior Circuit Judge

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*Honorable Dolores K. Sloviter's vote is limited to panel rehearing only.

The petition for rehearing filed by appellees in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court en banc, are denied.

BY THE COURT,

s/ MARJORIE O. RENDELL
Circuit Judge

Dated: April 13, 2015
tmm/cc: all counsel of record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-3536, 14-1374, 14-1376, 14-1377

GENEVA COLLEGE; WAYNE HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 13-3536

GENEVA COLLEGE; WAYNE L. HEPLER, in his personal capacity and as owner and operator of the sole proprietorship WLH Enterprises; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14–1374

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE, A CHARITABLE TRUST; THE ROMAN CATHOLIC DIOCESE OF ERIE; ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; ERIE CATHOLIC PREPARATORY SCHOOL,

AN AFFILIATE NONPROFIT CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14–1376

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust; THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as the Beneficial Owner of the Pittsburgh series of The Catholic Benefits Trust; CATHOLIC CHARITIES OF THE DIOCESE OF PITTSBURGH, INC., an affiliate nonprofit corporation of The Roman Catholic Diocese of Pittsburgh

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES

DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14–1377.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(District Court Nos.: 1-13-cv-00303; 2-12-cv-00207
and 2-13-cv-01459)
District Judges: Honorable Joy Flowers Conti;
Honorable Arthur J. Schwab

Argued on November 19, 2014

Before: McKEE, Chief Judge, RENDELL,
SLOVITER, Circuit Judges

JUDGMENT

These cases came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on November 19, 2014.

On consideration whereof,

IT IS ORDERED and ADJUDGED by this Court that the Judgments of the District Court entered June 18, 2013, December 20, 2013, and

December 23, 2013, be and the same, are hereby **reversed**.

Costs taxed against the appellees.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk of the Court

Dated: February 11, 2015

Certified as a true copy and
issued in lieu of a formal
mandate on April 15, 2015

Teste: *Marcia M. Waldron*
Clerk, U.S. Court of Appeals
for the Third Circuit

26 U.S.C. § 4980D

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.— Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination, the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and

exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.— In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures

during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as

defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be

imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security

Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or costsharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its fulltime employees (and their dependents) the opportunity to enroll in minimum

essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or costsharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—

For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 fulltime employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.— All persons treated as a single employer under subsection (b), (c), (m), or (o) of

section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as fulltime employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons

ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or costsharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

42 U.S.C. § 2000bb-1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and (4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000cc-5

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause "means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government
The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. § 300gg-13(a)

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[39]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[40]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

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[39] So in original. The word "and" probably should not appear.

[40] So in original. The period probably should be a semicolon.

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

26 C.F.R. § 54.9815-2713AT

(a) [Reserved]. For further guidance, see § 54.9815-2713A(a).

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services. (3) The organization holds itself out as a religious organization.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include

the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange

payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or

notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health

insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must--

(ii)[Reserved]. For further guidance, see § 54.9815-2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see § 54.9815-2713A(d).

(e) [Reserved]. For further guidance, see § 54.9815-2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. § 2590.715-2713A

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans--

(1) A group health plan established or maintained by an eligible organization that

provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that--

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in § 2510.3–16 of this chapter and § 2590.715–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally

facilitated Exchange user fee for a participating issuer pursuant to 45 CFR156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans--

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self- certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which

the issuer would otherwise provide contraceptive coverage under § 2590.715–2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv), the issuer is required to provide payments only for those

contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self- insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for

women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans--

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.131

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it

satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage--insured group health plans--

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self- certification described in paragraph (b)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization

provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services-- insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation

with respect to the federal requirement to cover all Food and Drug Administration- approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance--

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the

issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

80 Fed. Reg. 41,318

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(g) Other Comments That Relate to the July 2013 Final Regulations

In the August 2014 proposed regulations and interim final regulations, the Departments sought comment on other potential changes to the July 2013 final regulations in light of the proposed change to the definition of eligible organization. In particular, the Departments sought comment on applying the approach set forth in the July 2013 final regulations in the context of the expanded definition of eligible organization. The July 2013 final regulations provide for separate payments for contraceptive services for participants and beneficiaries in self-insured group health plans of eligible organizations in a manner that enables these organizations to completely separate themselves from administration and payment for contraceptive coverage. Specifically, the third party administrator must provide or arrange the payments, and the third party administrator can seek reimbursement for the costs (including an allowance for administrative costs and margin) by making an arrangement with a participating issuer—that is, an issuer offering coverage through a Federally-facilitated Exchange (FFE). The participating issuer can receive an adjustment to its FFE user fees to finance these costs.

One commenter suggested that the federal government set up a program to dispense these services using contractors. Another commenter

suggested that pharmaceutical companies could provide certain contraceptives directly by mail to persons who are told at a dispensing pharmacy that their plan has denied coverage. Additionally, the pharmaceutical companies could directly supply doctors who prescribe birth control, who in turn could dispense directly to patients who are not covered under their employer sponsored group health plan or student health insurance coverage. One commenter suggested making contraception available for any woman free of charge through a doctor. One commenter suggested providing contraceptive care through Medicaid.

The Departments have not adopted the proposals advanced by these comments for two reasons. First, the Departments do not have the legal authority to require pharmaceutical companies or doctors to provide contraceptives directly, nor do they have the authority to implement the other alternative arrangements proposed by these commenters. Second, these alternatives raise obstacles to access to seamless coverage. Consistent with the statutory objective of promoting access to contraceptive coverage and other preventive services without cost sharing, plan beneficiaries and enrollees should not be required to incur additional costs—financial or otherwise—to receive access and thus should not be required to enroll in new programs or to surmount other hurdles to receive access to coverage. The Departments believe that the third party administrators and health insurance issuers already paying for other medical and pharmacy services on behalf of the women seeking the contraceptive services are better placed to provide seamless

coverage of the contraceptive services, than are other providers that may not be in the insurance coverage network, and that lack the coverage administration infrastructure to verify the identity of women in accommodated health plans and provide formatted claims data for government reimbursement.

***

(b) *Contraceptive coverage – self-insured group health plans.* (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contract with one or more third party administrators. (ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include

the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (that is, whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3–16 and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange

payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or

notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

EBSA FORM 700—CERTIFICATION
(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR

147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at: http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

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In the Supreme Court of the United States

GENEVA COLLEGE,

Petitioner,

v.

SYLVIA MATHEWS BURWELL, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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CORPORATE DISCLOSURE STATEMENT

Petitioner Geneva College is a Pennsylvania nonprofit religious corporation. It does not have parent companies and is not publicly held.

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INTRODUCTION

To oppose review of this nationwide controversy, the Government insists it is delivering abortifacient coverage without involving Geneva College. But the statute and regulations say otherwise.

The Government has declared that the paperwork it forces Geneva to submit "is an instrument under which [Geneva's health] plan is operated." Pet. App. 182a. The regulations insist that the abortifacients will be available in "seamless coverage" with Geneva's own plan. 80 Fed. Reg. 41,318, 41,328 (July 14, 2015). The Government's rules explain that the accommodation is not an exemption from the Mandate, but is a way that "ε group health plan . . . complies" with it. *Id.* at 41,343. All of these descriptions are reinforced by the underlying statute, which imposes coverage in a "group health plan." 42 U.S.C. § 300gg-13(a).

The Government fashioned a Mandate scheme by which it delivers abortifacient coverage through objecting religious entities and their health plans, not apart from them. The Government could instead comply with RFRA by creating a system that does not involve Geneva College, but it chooses not to.

That is an issue of immense national importance. Geneva presents insured and student health plan arrangements that are very common and, therefore, essential to the Court's resolution of the issue. And the lower courts ruled on the gamut of issues implicated in this petition. This Court should grant review.

ARGUMENT

I. The Mandate's accommodation delivers abortifacient coverage through Geneva College and its own health plan.

The Government claims that it is only trying to provide "separate coverage" of abortifacients to Geneva College's employees and students. Opp. 13. If that were true, why would the Government insist that Geneva and its plan be involved in the process? No exempt church is required to submit a self-certification, much less one that involves them in the coverage the way this accommodation does. 45 C.F.R. § 147.131(a). If the Government really wishes to remove Geneva entirely from the process, why is Geneva not simply exempt, with no obligations, plan amendments, or connection to abortifacient coverage?

The answer is that the accommodation is designed to involve Geneva, not to distance it. Geneva does not object to separate coverage. It objects to the accommodation's mandatory involvement of Geneva and its health plan in the process. The only one stopping the Government from providing abortifacient coverage "separate" from Geneva's involvement is the Government itself.

The importance of the Government's disregard of *Hobby Lobby* in this case is demonstrated by the Government's regulations, which show that Geneva College's health plan is not separate from the abortifacient coverage to which it objects. Contrary to Respondents' assertions in their Opposition and to

those of the court below, the Mandate's accommodation does not remove Geneva, "totally" or otherwise, Pet. App. 43a, from the provision of coverage to which Geneva has a deep religious objection. Instead, the Government's rules explain that the coverage is coming through Geneva.

The Government often repeats that under the accommodation Geneva does not have to "contract, arrange, pay, or refer for" abortifacient coverage. *See, e.g.*, 80 Fed. Reg. at 41,319; Opp. 7–8. But this is a mantra rather than a reality. The legal reality is reflected in four mechanisms by which the accommodation makes objectionable coverage flow through Geneva and its health plan.

First, the form the Government forces Geneva to submit, the EBSA form 700, declares in no uncertain terms that "this form or a notice to the Secretary is an instrument under which the plan is operated." Pet. App. 182a. Necessarily then, Geneva must "contract" or "arrange" for abortifacient coverage. It must submit a self-certification amending its health plan contract (and, because Geneva is a large employer, it must enter that contract in the first place). The self-certification operates as an instrument of Geneva's health plan to guarantee abortifacient coverage. This is the reason the self-certification requires Geneva to identify its health insurer. *Id.*

The Government contradicts its own form when it claims that Geneva's "contracts with [its insurer] will continue to be 'solely for services to which [they] do not object.'" Opp. 18 (quoting *E. Texas Baptist*

Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015)). Instead, the self-certification says it makes delivery of the objectionable services part of Geneva's plan contract.

Second, the regulations go on to clarify that there is no cognizable separation between the abortifacient coverage and Geneva's health plan. The Government received comments suggesting that it should create an accommodation where objectionable coverage is truly separate. 80 Fed. Reg. at 41,328. The Government explained, however, that it was rejecting all such alternatives. Instead, it adopted the present accommodation because truly separate "alternatives raise obstacles to access to seamless coverage." *Id.* Thus the Government finalized an accommodation to deliver abortifacient coverage "in accommodated health plans," which are "better places to provide seamless coverage of the contraceptive services." *Id.* at 41,328–29.

The Government therefore created the particular structure precisely because the accommodation delivers objectionable coverage in a manner connected to the health plan for which Geneva contracts, arranges, and pays. It is impossible for the Government to claim simultaneously that Geneva is removed from providing abortifacient coverage, while insisting that coverage is "seamless" with Geneva's health plan.

The Government tries to rationalize its "separation" theory by protesting that "the 'seamless' nature of the coverage does not reflect any involvement by the objecting employers," because

they do not pay for it. Opp. 19. But Geneva's objection is not just about paying. The Government has declared the abortifacient coverage is incorporated through Geneva's plan. It cannot simply declare by fiat that such coverage is really separate. The Government says there is no daylight between Geneva's plan and delivery of abortifacients to women. Therefore the accommodation must also be a substantial burden on Geneva's religious beliefs. The Government's parsing of connectedness from separateness is the same kind of argument this Court rejected in *Burwell v. Hobby Lobby Stores, Inc.*: "[a]rrogating the authority to provide a binding national answer to [a] religious and philosophical question" of attenuation. 134 S. Ct. 2751, 2778 (2014).

Third, the interconnectedness between abortifacient coverage and Geneva's plan is shown by the sharp difference within the Government's rules between an exemption and the accommodation. Religious exemptions are limited to church-related groups. 45 C.F.R. § 147.131(a). Only they are exempt "religious employers." *Id.* Nothing is required of them or their health plan: no notice, no abortifacient coverage through their plan, and no mechanism to provide such coverage to their employees. It is truly an exemption.

The accommodation is not an exemption. The Government explicitly rejected the suggestion to expand the exemption to other "religiously affiliated ministries" like Geneva. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). Instead of being an exemption, the accommodation is a *method of compliance*. The

Government's rules explain that through the accommodation process, "a group health plan . . . complies" with the Mandate. 80 Fed. Reg. at 41,343. That process requires Geneva to submit a form that amends its plan instrument to ensure abortifacient coverage. In this respect, the Government misconstrues its regulations when it states that "[t]he accommodation exempts religious objectors." Opp. 13. The Mandate creates only one exemption—for "religious employers" under 45 CFR § 147.131(a)—and the accommodation is not it.

Fourth, the underlying reason the accommodation makes Geneva comply in its plan, instead of being exempt, is because the Mandate's statutory source requires compliance. That ACA provision, 42 U.S.C. § 300gg-13(a), mandates coverage by a "group health plan and a health insurance issuer offering group or individual health insurance coverage." *Id.* Because Respondents did not exempt Geneva, they painted themselves into a corner where their accommodation forces Geneva to "compl[y]." 80 Fed. Reg. at 41,343. And because Geneva complies, it is forced to provide abortifacient coverage through its "group health plan," per the statutory mandate.

By employing an accommodation where Geneva "complies" instead of being exempt, the Government chooses to involve Geneva in the delivery of abortifacients. This is why the accommodation forces Geneva to amend its plan to guarantee the coverage. As such, the Government is incorrect to claim that Geneva seeks "to require the Government to conduct its own internal affairs in ways that comport with

the religious beliefs of particular citizens." Opp. 17 (quoting *Bowen v. Roy*, 476 U.S. 693, 699 (1986)). Geneva's health plans and contracts are not "internal affairs" of the Government. They are internal affairs of Geneva. Nor is Geneva's plan "the government's arrangements with third parties." *Id.* It is the Government's arrangements with Geneva's own behavior. Paradoxically, the Government has redefined Geneva's private affairs as purely government affairs, and then chided Geneva for objecting to government activity.

Geneva's integral involvement under the accommodation belies the Government's assertion that Geneva's insurer must "expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan." Opp. 23 (quoting 45 C.F.R. § 147.131(c)(2)(1)). This toothless disclaimer is an insufficient summary of what is happening. The accommodation also forces Geneva to amend its contract to include objectionable coverage, attaches that coverage in an undifferentiated manner to Geneva's plan, and imposes compliance with the intra-plan Mandate rather than an exemption.

If the Government truly wanted to remove Geneva from the process of providing abortifacient coverage, it would not continue to involve Geneva or its health plan in any of these ways. Out of one side of its mouth the Government claims to exclude abortifacients from Geneva's plan, while out of the other side it ensures that the coverage is inseparable from the plan. This brings to mind the lament of Michael Corleone: "Just when I thought I was out

. . . they pull me back in!"[1] The Court should not ignore the levers that the accommodation creates to pull Geneva and its plan back into providing abortifacient coverage even while the Government feigns Geneva's removal.

The Government sought, and still seeks, to define "substantial burden" under RFRA by means of causal "attenuat[ion]" instead of by the "very different question" of pressure that the Government places on Geneva to violate its beliefs. *Hobby Lobby*, 134 S. Ct. at 2777–78. The reason the Government's accommodation is so different from how the Government describes it is that the ACA and ERISA create legal barriers to letting Respondents achieve both separation and coverage through a plan. The Government could amend those statutes to remove Geneva from the process, but instead Respondents prioritized contraception access to respecting Geneva's separation from abortifacient coverage. So they created a regulatory scheme whose mechanics explicitly require the involvement and ongoing use of Geneva and its health plan. The Government has chosen to call the scheme separate instead of making it so.

Given that the actual operation of the accommodation bolsters Geneva's case, it is not surprising that the Government would argue that "Petitioners' RFRA claims do not depend on the details of the accommodation." Opp. 21. The Government similarly maintained in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

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[1] *The Godfather: Part III* (Paramount Pictures 1990).

U.S. 418, 430 (2006), that there was "no need to assess the particulars" of its statutory scheme. But this Court held that RFRA requires "an inquiry more focused than the government's categorical approach." *Id.* What the accommodation does—as distinct from what the Government says it does—is essential to the Court's inquiry. The accommodation makes abortifacient coverage flow necessarily with, through, and by amending Geneva's own health plan, forcing it to comply rather than be exempt from the group plan Mandate.

The Government is incorrect in characterizing Geneva's objection as focusing on what happens "after" it sends a mere notification off. *See* Opp. 15 (citing Pet. App. 37a). The notification itself amends Geneva's plan, which is a plan it continues to provide in an ongoing manner. The objectionable coverage is not occurring "after," but during, as a result of, and inseparable from the actions of Geneva and its health plan.

The Government could provide this coverage in other separate ways, but it chooses not to do so. For example, Congress could amend the ACA and ERISA to allow the Government to ensure coverage without involving Geneva. Or, in light of the Government's history of implementing provisions of the ACA, it could make contraceptive coverage available through sources separate from Geneva, such as the ACA's state exchanges for health plans.

But Geneva does not maintain that "employers may prevent their employees from receiving contraceptive coverage," or that the Government

may not "arrang[e] for third parties to provide those women with separate coverage." Opp. 13. Geneva's claim by no means stops the Government from arranging separate coverage. The accommodation does not create separation between Geneva and the abortifacient coverage to which it objects. It effectively forces Geneva to arrange and contract for that coverage, and merely labels the scheme "separate" so as to advance a new version of the attenuation argument that the Government lost in *Hobby Lobby*.

II. The courts below fully considered the RFRA elements raised against the Mandate.

The Government is incorrect in suggesting that this case is a poor vehicle due to an alleged inadequacy in the scope of the proceedings below. The district court thoroughly considered all elements of Geneva's RFRA claim, twice: first for Geneva's student health plan, and again for its employee plan. Pet. App. 50a–124a. This involved consideration of Geneva's religious exercise, the substantial burden that the Mandate and its accommodation impose, whether the Government has established a compelling interest, and whether the accommodation is the least restrictive means of serving such an interest. *See, e.g.*, Pet. App. 71a–75a. This provides an ample and thoughtful record analyzing the issues raised in Geneva's RFRA claim.

The Third Circuit below zeroed in on the substantial burden argument, wrote on that issue extensively, and thus established a broad foundation for review of the predominant issue in the current

controversy that involves religious non-profits. Pet. App. 29a–48a. A similar scope characterized the decisions this Court reviewed in the for-profit context, including the Third Circuit's decision in *Conestoga Wood Specialties Corporation*. *See* 134 S. Ct. 678 (2013) (granting certiorari petition). In *Conestoga* the Third Circuit, as here, did not reach the compelling interest and least restrictive means issues simply because it found no substantial burden. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 389 (3d Cir. 2013). This Court granted certiorari anyway.

It should do so again. The substantial burden issue is the heart of the present dispute. Indeed, the court of appeals ruled below not only that Geneva's free exercise rights are not substantially burdened, but that they are not burdened at all. Pet. App. 46a. That extreme ruling deserves this Court's review. The extensive judicial discussion of all of RFRA's elements, including in the district court below, demonstrates that the Third Circuit's focus on the substantial burden still allows this Court to adequately explore strict scrutiny or any of the issues Geneva has raised.

III. Geneva College sponsors health plans that are essential to the resolution of this controversy.

The Government is also incorrect in suggesting that this case presents an inadequate vehicle because of the nature of Geneva College's health insurance arrangements. To the contrary, this case

presents questions at the core of religious organizations' quandary under the Mandate.

Geneva sponsors both a fully insured plan and a student health plan. Fully insured health plans are common among religious groups due to the economic difficulty of a small or mid-sized non-profit organization self-funding its health insurance. Moreover, many religious institutions are engaged in the ministry of education, so the Mandate's impact on student health insurance is an important concern. Thus this case presents key insurance arrangements that are essential for this Court's resolution of the national controversy over the accommodation.

In addition to Geneva's own insurance arrangements, the decision below analyzed self-insured health plans, and health plans sponsored by exempt churches but in which non-exempt entities participate, because those issues were raised in a consolidated case. Pet. App. 24a–28a; *see also Zubik v. Burwell*, Pet. for Writ of Cert. (No. 14-1418) (May 29, 2015). Reviewing the Third Circuit's decision *in toto* would provide the Court with fully insured, self-insured, student, and church-sponsored health plan arrangements to consider.

The simplicity of Geneva's facts is also a virtue that makes this case an ideal vehicle for review. This case does not present complicated issues concerning whether its health plan is exempt from ERISA, and how that might affect the Government's authority, or how administrators of Geneva's plan might respond to directives under the accommodation. Geneva's fully insured and student plans present a clean and

essential vehicle for resolving the nationwide controversy over the relationship between RFRA and the Mandate's accommodation.

Geneva also comes to this Court as a religious organization whose community members solidly align with its organizational views on the sanctity of preborn human life. *See* Pet. App. 54a. This is an important fact in light of the Government's refusal to exempt Geneva based on its unsourced speculation that employees of churches "are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874. A district court recently ruled that the Government's refusal to exempt an organization whose employees specifically oppose abortifacient items is irrational in light of the Government's decision to fully exempt churches with "likely" anti-contraception employees. *See March for Life v. Burwell*, No. 1:14-cv-01149-RJL, slip op. at 12–17 (D.D.C. Aug. 31, 2015). Geneva thus represents the ideal kind of organization to advocate the importance of the national controversy between religious objections and the Mandate's accommodation.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GENEVA COLLEGE, PETITIONER,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES IN SUPPORT OF PETITIONER GENEVA COLLEGE

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QUESTION PRESENTED

Whether the alternative means for nonprofit religious employers to comply with the Affordable Care Act's contraceptive mandate eliminate the substantial burden on religious exercise or the violation of the Religious Freedom Restoration Act that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), or whether these alternative means violate the Establishment Clause of the First Amendment?

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BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING THE PETITIONER

Amicus curiae, The Council for Christian Colleges and Universities, respectfully submits that the judgment of the United States Court of Appeals for the Third Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

The Council for Christian Colleges and Universities (CCCU) is an international association of Christ-centered colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, About CCCU, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 122 members in North America, all of which are regionally accredited colleges and universities with curricula rooted in the arts and sciences. In addition, the CCCU has another 61 affiliate member institutions with Christian missions. The CCCU's membership spans 33 states and 19 countries and has over 400,000 students enrolled and almost 2 million alumni.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and letters of consent are on file with the Clerk's Office.

Geneva College is a CCCU member. Like all CCCU member institutions, Geneva College is committed to applying Christian doctrine and belief to all areas of human endeavor. That includes when life begins, the morality of ending an innocent life, and the responsibility of people and institutions for complicity with provision of abortifacient products. For that reason, in an unprecedented series of lawsuits, 18 CCCU member institutions have challenged the federal mandate requiring member institutions to provide their students and employees with cost-free access to FDA-approved abortifacients.[2]

The Third Circuit's decision is inconsistent with the religious liberty guaranteed by the Constitution and the Religious Freedom Restoration Act. As this Court recently explained, federal judges may not substitute their views of moral complicity for those of religious individuals and organizations. Such questions are the very type of government interference with the exercise of religion that the Religious Freedom Restoration Act was intended to prevent.

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[2] The list of all CCCU member institutions' lawsuits is provided in Appendix A.

STATEMENT

Religious colleges and universities have played an important role in the history of our nation. Many of the nation's best-known institutions of higher education including Harvard, Yale, Princeton, and Rutgers were founded by churches and denominations. Throughout the nation's history, religious institutions of higher learning have wrestled with the moral and practical implications of Christianity. Because of this, for instance, religious institutions were motivated to train abolitionists in the early 1800s who helped contribute to the end of slavery decades later. For example, Oberlin College in 1850, then a Presbyterian college, was a hotbed for abolitionists. Harriet Beecher Stowe was the daughter of the president of Lane Seminary in Cincinnati, another center of abolitionist training in the 1830s.

The commitment to wrestle with the moral implications of being centers of learning with deep Christian convictions continues at religious colleges and universities throughout the country to this day. This commitment compels religious colleges and universities throughout the country to object to any participation in the provision of some or all of the contraceptive services required by the Affordable Care Act.

SUMMARY OF ARGUMENT

The Third Circuit's decision is deeply flawed. Not only did the Court expropriate to the judiciary the theological decision of when an organization is complicit in the taking of innocent life, but it also concluded that government is free to favor the free exercise of some religious organizations and not others, contrary to the Religious Freedom Restoration Act and the First Amendment.

The government's decision to exempt some religious employers from providing contraceptive coverage while requiring others to comply with the mandate demonstrates that the government's approach is not the least restrictive means necessary to advance its interests. The government concedes that when religious organizations that oppose the use of contraceptives generally, or a subset of FDA-approved contraceptives that may operate as abortifacients more specifically, hire co-religionists, their employees are "less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). And the government acknowledges that exempting certain religious employers does not impair its interests. Many religious organizations, including all of CCCU's member institutions, restrict their hiring for most or all positions to co-religionists. And these institutions' religious exercise is indistinguishable from that of exempt religious employers. Both teach the faith, engage in regular corporate worship, pray, and provide faith-based volunteer and social services.

In other words, the government's distinction between which religious organizations are exempt and which are administratively accommodated is arbitrary and unnecessary for the effectiveness of the Affordable Care Act. The government's interests will not be frustrated by exempting Petitioners (and other similar religious organizations) from complying with the contraceptive mandate. Indeed, this is precisely what the Religious Freedom Restoration Act requires.

Worse yet, the government's discrimination between types of religious organizations is at odds with the First Amendment, which forbids arbitrary distinctions in the treatment of religious groups and prohibits officially preferring one religious group over another. The distinction the Departments draw between churches, other religious nonprofits, and non-religious nonprofits is unprecedented and unconstitutional.

ARGUMENT

I. The Court should grant the petition because the government has forced religious nonprofits to choose between their religious duties.

The issues raised in the Petition have exceptional implications for the health-insurance decisions of religious nonprofits, including CCCU's member institutions. This is perhaps best demonstrated by the recent decision of Wheaton College to end its student health insurance plan. After an adverse ruling by the Seventh Circuit, *Wheaton Coll.* v. *Burwell*, 791 F.3d 792 (7th Cir. 2015), Wheaton

made the difficult decision to terminate its student health insurance plan to avoid being complicit in providing abortifacient drugs and devices to Wheaton's students. Wheaton College Health Insurance Announcement (Jul. 10, 2015) *available at* http://tinyurl.com/qb29b8e (last visited Sept. 10, 2015). Other religious colleges and universities have made similar painful decisions. See Libby A. Nelson, College Ends Student Health Plan, Inside Higher Ed (May 16, 2012) *available at* http://tinyurl.com/nna7jjc (last visited Sept. 10, 2015); Ave Maria University Discontinues Student Health Insurance Because of Federal Government's Mandate (May 21, 2012) *available at* http://tinyurl. com/p8r4fx2 (last visited Sept. 10, 2015). Because the issues raised are of exceptional importance to the nation's religious nonprofit institutions, the Court should grant the Petition.

II. Imposition of the contraceptive mandate on religious entities like Petitioners does not advance a compelling government interest in the least restrictive manner.

It is difficult, if not impossible, to understand how enforcing the contraceptive mandate against Petitioners is the least restrictive manner in which to protect an interest of the highest order (see 42 U.S.C. § 2000bb-1), given that the government has already conceded that it does no harm to exclude churches and integrated auxiliaries from the mandate.

Under the Affordable Care Act, employer-sponsored group health plans must meet minimum-coverage requirements. These requirements include

covering preventive health care services without requiring health plan participants or beneficiaries to share the costs of these services through copayments, deductibles, or co-insurance. 42 U.S.C. § 300gg-13.

The Departments of Health and Human Services, Labor, and Treasury issued regulations that require employer-sponsored group health plans to include the full range of FDA-approved contraceptive services as preventive health care services. See 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); Health Resources and Services Administration, Women's Preventive Services Guidelines, *available at* http://www.hrsa.gov/womensguidelines (last visited Sept. 10, 2015).

The Departments exempted religious employers, but limited the scope of "religious employers" to those non-profit organizations that are exempt from filing informational tax returns under the Internal Revenue Code. 45 C.F.R. § 147.131(a) (referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)). The Internal Revenue Code provides that all tax-exempt organizations must file informational tax returns except, inter alia, "churches, their integrated auxiliaries, and conventions or associations of churches, . . . or the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A).

Congress requires tax-exempt nonprofit organizations to file informational tax returns "to provide the Internal Revenue Service with the information needed to enforce the tax laws." H.R. Rep. No. 413, at 36 (1969). In other words, informational returns are required to allow the IRS to police whether a

given entity continues to be tax exempt. Congress was not seeking to determine which organizations were religious and which were not.[3] And Congress did not create a tripartite system in which churches and their integrated auxiliaries were exempt from filing informational returns, other religious nonprofits were required to provide modified informational returns, and nonreligious nonprofits were required to provide complete informational returns.

The Departments, however, have created exactly such a tripartite structure here, distinguishing between religious employers and all other religious nonprofits. The Departments theorize that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). The Departments offer no support for this assumption.

Recognizing that many religious organizations that are not "churches, their integrated auxiliaries, ... or ... religious orders" objected to providing coverage for some or all contraceptives, the Departments devised an "accommodation" for

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[3] Indeed, such a goal and inquiry would likely impermissibly entangle the federal government with religion. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971) (stating that a statute "must not foster 'an excessive entanglement with religion").

nonexempt religious employers. See 45 C.F.R. § 147.131(c)(1). A similar accommodation exists for religious colleges and universities that arrange for student health insurance coverage. 45 C.F.R. § 147.131(f). The accommodation allows certain religious nonprofit employers to fulfill their statutory obligation to provide coverage including all FDA-approved contraceptives. In other words, the employees of religious nonprofits who are accommodated still receive insurance coverage for religiously objectionable contraceptives by virtue of their employment by the religious nonprofit via the health care coverage network and infrastructure provided and maintained by the religious non-profit. 80 Fed. Reg. 41,318, 41,328 (July 14, 2015).

Religious colleges and universities cannot be exempt employers. Even a religious college or university that is affiliated with a church or an association of churches cannot be an "integrated auxiliary" because colleges and universities receive more than 50% of their support from students and outside sources. See 26 C.F.R. § 1.6033-2(h)(1), (h)(4). Consequently, religious colleges and universities must comply with the contraceptive mandate.

The government's decision to exempt fully a category of entities—religious employers—regardless of whether they even object to contraceptive coverage cannot be squared with its refusal to exempt other religious groups like Petitioners who actually do have religious objections. See *Hobby Lobby*, 134 S. Ct. at 2777 n.33. The government offers no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the government] may

treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J. concurring). After all, "[e]verything the government says about [exempt religious employers] applies in equal measure to" Petitioners. *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006).

The government concedes that exempting churches and their integrated auxiliaries "does not undermine the governmental interests furthered by the contraceptive coverage requirement [because they] employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. This is no less true for religious non-profits. For instance, all CCCU member institutions, like many other religious nonprofits, restrict their hiring practices for full-time faculty, administrators, and in many instances, all positions, to Christians. See CCCU, Members & Affiliates: Membership Requirements, *available at* http://www.cccu.org/members_and_affiliates (last visited Sept. 10, 2015) ("Member campuses must have a continuing institutional policy and practice . . . to hire as full-time faculty members and administrators (non-hourly staff) only persons who profess faith in Jesus Christ.").) Thus, the government cannot reasonably contend that extending the exemption to Petitioners and avoiding substantially burdening Petitioners' religious exercise would undermine the government's interests.

The government's method for distinguishing between exempt religious employers and religious

employers who must comply with the contraceptive mandate bears no relation to the civil rights of religious organizations that the government is obligated to protect. The Internal Revenue Code exempts churches from filing informational tax returns, but not other 501(c)(3) religious organizations. This is understandable given that requiring churches to provide detailed financial information including the identity of all their financial supporters would impose a substantial administrative burden on churches and could chill religious exercise. But the distinction drawn by Congress is not intended to address religious objections to filing informational tax returns. It is beyond strange to apply that same distinction to decide which religious nonprofit organizations' civil rights deserve second-class treatment.

The government's distinction between religious nonprofits is even less defensible when applied to religious colleges and universities. Like houses of worship, the very purpose for which religious colleges and universities exist is "the propagation of a religious faith." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). For that reason, Petitioners and CCCU's member institutions engage in many of the same religious activities as houses of worship and their integrated auxiliaries including organized worship, corporate prayer, pastoral counseling, communal singing of religious songs, proselytizing, faith-based social service, and evangelistic outreach.

The government's distinction thus ultimately discriminates among "types of institutions on the basis of the nature of the religious practice [that the

government perceives] these institutions are engaged in." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008). Such distinctions are at the least constitutionally suspect. See *ibid.* The government's definition of religious employer favors religions, religious denominations, and religious organizations that fit neatly into the government's view of what constitutes religious activity, while disadvantaging groups that exercise their faith through other means such as fulfilling their educational missions or that for theological reasons are organized in ways that do not fit neatly within the government's box.

The absurdity of the Departments' distinction between exempt religious employers and non-exempt religious employers is shown by the treatment of seminaries. Seminaries that are affiliated with a church or association of churches are exempt from the contraceptive mandate because they are exempt from the internal-support requirement. See 26 C.F.R. § 1.6033-2(h)(5). Seminaries that are not affiliated with a church or association of churches are not exempt even though they provide exactly the same service (training ministers) and even if they hire only co-religionists as employees. If, for theological reasons, a seminary is established independent from any church, synagogue, or denomination, that seminary is not exempt. But if the seminary is affiliated with a denomination, it is exempt from the contraceptive mandate and the government concedes that would not frustrate its interests. Civil rights should not vary based upon whether that institution is or is not affiliated with a church or other house of worship.

In fact, the "religious employer" definition is itself offensive to religions when it defines religious employers essentially as including only houses of worship. This may be consistent with how the U.S. Department of Health and Human Services Administration views "religion." But wholly aside from the problems inherent with the accommodation, it likely violates RFRA for the Government to define religious employer in such a way as to exclude religious organizations like the CCCU's members.

The religious-employer exemption demonstrates that the government's accommodation for nonexempt religious employers is not the least restrictive means for advancing the government's interests.

III. The Departments' distinction between churches and other religious entities impinges upon the protections guaranteed by the Establishment Clause.

The Departments' distinctions raise several Establishment Clause concerns as well. As explained *supra*, the government's definition of religious employer favors certain religions—those religions whose organizational form fits into the box the government classifies as essential religious activity—while disfavoring other faith groups that do not exercise their religious beliefs in the way defined by the government. This violates the "clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). The government's distinction between exempt religious employers and non-exempt religious employers has the precise effect of choosing sides

between religious bodies. This is the very result against which the Establishment Clause is intended to protect. As the Court stated in *Larson* the "history and logic of the Establishment Clause" require that the government not "prefer one religion over another." *Id.* at 246 (quotations omitted). Indeed, the Establishment Clause "mandates governmental neutrality between religion and religion." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968).

The Departments do not even attempt the pretense of neutrality. Their distinctions make clear that they are treating certain religious groups differently from other religious groups. This is constitutionally impermissible.

That is not the only Establishment Clause concern, however. As the Tenth Circuit articulated in *Colorado Christian University* v. *Weaver*, "[e]ven assuming that it might, in some circumstances, be permissible for [the government] to pick and choose among eligible religious institutions, a second line of Supreme Court precedents precludes their doing so on the basis of intrusive judgments regarding contested questions of religious belief or practice." 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.) As the Tenth Circuit noted, this Court, among others, has stated on numerous occasions that such inquiries are impermissible. *Id.* (citing *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) ("[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or

institution's religious beliefs."); *Catholic Bishop of Chicago*, 440 U.S. at 502 ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

Again, *Larson* is instructive. There, the state statute at issue required religious organizations that received half or less of their total contributions from non-members or non-affiliates to register with the state. The Holy Spirit Association for the Unification of World Christianity and its followers brought suit after the state notified them that the association was required to register under the act based on this "fifty per cent rule." The Court held that the act was unconstitutional, in part, because of the distinctions drawn by the act entangled the state in religion and "engender[ed] a risk of politicizing religion." 456 U.S. at 253 (quotations omitted). The act at issue "impose[d] the registration and reporting requirements . . . on some religious organizations but not on others." *Id.* This was constitutionally problematic: "The fifty percent rule . . . effects the selective legislative imposition of burdens and advantages upon particular denominations. The 'risk of politicizing religion' that inheres in such legislation is obvious." *Id.* at 253-254.

The same is true here. The government has selectively imposed burdens and advantages on different religious entities based on arbitrary and nonsensical distinctions. This not only risks the sort of politicization of religion against which the Establishment Clause protects; it effects that very politicization. The lawsuits challenging the

accommodation provided to non-church religious organizations are Exhibit A of that effect. Accordingly, the government's religious-employer exemption is fatally flawed under the Establishment Clause.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

In addition to Petitioners, the following CCCU member institutions have initiated litigation to enjoin the contraceptive mandate as to at least abortifacient contraceptive services:

1. *East Texas Baptist Univ.* v. *Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013) (granting summary judgment against the government) *rev'd sub. nom. East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015) (cert. pet. pending)

   The following CCCU members are parties:

   Houston Baptist University

   East Texas Baptist University

2. *Southern Nazarene Univ.* v. *Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 794 F.3d 1151, (10th Cir. 2015) (cert. pet. pending)

   The following CCCU members are parties:

   Southern Nazarene University

   Oklahoma Baptist University

   Oklahoma Wesleyan University

3. *Wheaton Coll.* v. *Burwell*, 50 F. Supp. 3d 939 (N.D. Ill. 2014) (denying preliminary injunction against enforcement of the contraceptive mandate) *aff'd* 791 F.3d 792 (7th Cir. 2015) (time for filing petition for writ of certiorari expires September 29, 2015)

   The following CCCU member is a party:

   Wheaton College

4. *Dordt Coll.* v. *Sebelius*, 22 F. Supp. 3d 934 (W.D. Ia. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to Eighth Circuit is pending, argued in December 2014)

   The following CCCU members are parties:

   Dordt College

   Cornerstone University

5. *Grace Schs.* v. *Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to Seventh Circuit is pending, argued in December 2014)

   The following CCCU members are parties:

   Grace College

   Biola University

6. *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013) (dismissed on mootness grounds)

   The following CCCU member is a party:

   Franciscan University of Steubenville

7. *School of the Ozarks, Inc.* v. *Sebelius*, --- F. Supp. 3d ---, 2015 WL 527671 (W.D. Mo. Jan. 13, 2015) (granting summary judgment in favor of the government) (appeal to the Eighth Circuit is pending)

   The following CCCU member is a party:

   College of the Ozarks

8. *Louisiana Coll.* v. *Sebelius*, 38 F. Supp. 3d 766 (W.D. La. 2014) (granting summary judgment against government) (appeal to the Fifth Circuit is pending)

   The following CCCU member is a party:

   Louisiana College

9. *Colorado Christian Univ.* v. *Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to the Tenth Circuit is pending)

   The following CCCU member is a party:

   Colorado Christian University

10. *Association of Christian Schs. Int'l* v. *Burwell*, 75 F. Supp. 3d 1284 (D. Colo. 2014) (denying preliminary injunction against enforcement of the contraceptive mandate) (appeal to the Tenth Circuit is pending)

The following CCCU members are parties:

Asbury Theological Seminary

Indiana Wesleyan University

Taylor University